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June 15, 2009

Ex Parte

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *WT Docket 09-66*

Dear Ms. Dortch:

Earlier today Verizon Wireless filed comments in the above-captioned docket and inadvertently excluded the attachment. We are refiling the identical comments with the attachment.

Please direct any questions regarding this filing to the undersigned.

Sincerely,

Charla M. Rath

cc: Chelsea Fallon
Pramesh Jobanputra
Best Copy and Printing, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 6002(b) of the	)	
Omnibus Budge Reconciliation Act of 1993	)	
	)	WT Docket No. 09-66
14th Annual Report and Analysis of	)	
Competitive Market Conditions with	)	
Respect to Commercial Mobile Services	)	

COMMENTS OF VERIZON WIRELESS

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Date: June 15, 2009

SUMMARY

In its most recent report on Commercial Mobile Radio Services competition, the Commission concluded that U.S. consumers continue to benefit from low prices, new technologies, improved service quality and choice among carriers. That report provides a detailed and comprehensive analysis of the industry, using an appropriate framework for reviewing competitive markets, that is faithful to Congress's direction in Section 332(c)(1)(C) of the Communications Act that the Commission prepare an annual report on CMRS competition. The Commission should continue to use the same approach for its 2009 review, and should not adopt rigid criteria for measuring effective competition that quickly could become outmoded.

That report's key conclusion remains valid: the mobile wireless market remains robustly competitive. Midsize carrriers, such as MetroPCS and Leap, are rapidly growing and offering consumers new options for mobile service. Both MetroPCS and Leap are leaders in prepaid and no-contract services, which continue to attract more customers by offering new choices for wireless plans. Other prepaid providers such as Tracfone continue to grow rapidly. In addition, there are new entrants such as Cox Communications, which has announced plans to launch wireless service using the spectrum it bought at auction, Atlantic Tele-Network, which will expand from being a wholesale provider to enter the retail wireless market, and Clearwire, which is the first carrier to begin deploying a nationwide next generation mobile wireless network using the largest spectrum position of any wireless company.

The past year has seen continued, vigorous competition, marked by the rapid growth of new plans, devices and features which are offered by a wide variety of

providers. Customers are clearly benefiting from this intense competition, and have ever-expanding choices for meeting their communications and information needs. These choices extend to wireless handsets as well. Customers have a multitude of devices of every price range, offering literally hundreds of features and applications. As carriers strive to win and keep customers, they compete intensively to offer devices that will prove popular with customers, driving innnovation, which in turn benefits consumers and competition.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Implementation of Section 6002(b) of the Omnibus Budge Reconciliation Act of 1993	)	
	)	WT Docket No. 09-66
14th Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services	)	

COMMENTS OF VERIZON WIRELESS

Verizon Wireless submits these comments in response to the Public Notice seeking information and data regarding the state of competition in the Commercial Mobile Radio Services market.[1]

I. THE WIRELESS MARKET REMAINS ROBUSTLY COMPETITIVE.

Six months ago, the Commission released its 13th report on CMRS competition.[2] The detailed, 190-page report compiled extensive data and other research to support the Commission's central finding: "U.S. consumers continue to reap significant benefits – including low prices, new technologies, improved service quality, and choice among

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[1] Wireless Telecommunications Bureau Seeks Comment on Commercial Mobile Radio Services Market Competition, *Public Notice,* WT Docket No. 09-66, DA 09-1070 (rel. May 14, 2009) ("*Public Notice*").

[2] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Thirteenth Report*, WT Docket 08-27, (rel. Jan. 16, 2009) *("13th Competition Report").*

providers – from competition in the CMRS marketplace, both terrestrial and satellite CMRS."[3]

The Commission's conclusions in that report remain fully valid today. The mobile wireless market remains robustly competitive by any measure. A recent filing by CTIA demonstrates that the U.S. market is the most competitive in the 26 Organisation for Economic Co-operation and Development ("OECD") countries.[4] In addition to four national carriers, Verizon Wireless, AT&T Mobility, T-Mobile, and Sprint Nextel, there are numerous regional carriers such as MetroPCS, Leap Wireless and US Cellular. This range of competition does not exist outside the United States. And the picture is not static; new companies are entering or could enter the market.[5]

- Clearwire, described in greater detail below, has begun deploying a nationwide next generation mobile wireless network.
- Atlantic Tele-Network will be another new entrant in the retail wireless market. It has entered into an agreement to acquire nearly 800,000 customers in 26 cellular market areas from Verizon Wireless.[6]
- Cox Communications also has announced plans to launch wireless service using the spectrum it bought at auction.[7]

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[3] *13th Competition Report* at ¶ 1.

[4] Letter from Chistopher Guttman-McCabe, CTIA, to Secretary, FCC, WC Docket No. 07-52 (May 12, 2009).

[5] Carriers also face significant threats from competitors other than service providers. "Carriers are facing increased competition and service cannibalization from off-deck content and over-the-top applications, integrated customization and services from innovative handset OEMs, and emerging distribution channels. In an open network world, carriers have to learn to compete by leveraging their strategic positions, rather than by relying on controlling user experiences within a walled garden." Macquarie Research Equities, *Wireless Emerging Devices* (March 30, 2009) at 1 (*"Wireless Emerging Devices Report"*). *See also* Section IV below describing in detail device competition in the United States.

[6] Press Release, Atlantic Tele-Network, *Atlantic Tele-Network to Acquire Divestiture Properties from Verizon Wireless* (June 9, 2009) Available at http://www.atni.com/pr_web.php?nd=090609&pr=01 (last accessed June 15, 2009).

- Licensees with national, or near national, spectrum footprints, such as Echostar and SpectrumCo (a conglomerate of the nation's largest cable televison companies) are capable of entering the market.
- Many rural telephone companies and small licensees either currently offer wireless service or hold spectrum and assets that could be used to rapidly enter the market.

Consumers are clearly benefiting from this vigorous competition as carriers fight to win and retain their customers. In January 2009, *Consumer Reports* summarized the results of its annual wireless consumer survey as showing a "surge in satisfaction" among cellular customers, and that "Overall, cell-phone service has become significantly better. … Sixty percent of readers were completely or very satisfied with their service."[8] And in May, the American Customer Satisfaction Index, an organization that measures customer satisfaction with the quality of various products and services, reported that "Customer satisfaction with wireless telephone services reaches a new all-time high for the third consecutive year."[9]

In a declaration filed with the FCC in 2008, two economists studying the CMRS market concluded that a number of conditions that could signal lack of competition – such as the presence of a dominant firm, the ability of a firm to exclude rivals, high barriers to entry that are controlled by an incumbent firm and the ability of incumbent

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[7] Press Release, Cox Communications, *Cox To Launch Next Generation Bundle With Wireless In 2009* (Oct. 27, 2009), *available at* http://cox.mediaroom.com/index.php?s=43&item=19 (last accessed June 15, 2009); *see also* Amol Sharma and Vishesh Kumar, *Cox Plans to Launch a Cellular Network Unlike Cable Rivals, Atlanta Company Sees Need to Own a Wireless System*, Wall Street Journal (Apr. 7, 2009) ("*Sharma and Kumar*").

[8] Consumer Reports, *Best Cell-Phone Service*, January 2009, at 28.

[9] Press Release, *ACSI: Customer Satisfaction Rises Again, Now Jointed by Other Economic Indicators*,(May 19, 2009), *available at* http://www.theacsi.org/images/stories/images/news/0901q_Press_Release.pdf.

firms to coordinate business activities – were absent from the CMRS market.[10] Hahn and Singer found "ample evidence to show each of the above condition[s] is in fact absent in today's American wireless marketplace, thereby confirming that this particular market is indeed competitive by the standards the Commission has historically used."[11] Verizon Wireless recently submitted a statement to the House Committee on Energy and Commerce, Subcommittee on Communications, Technology and the Internet, in which we describe in detail the many benefits of competition to the consumer.[12] Several trends evident from the past 18 months reinforce the continuing accuracy of the Commission's conclusion in the *13th Competition Report*.

Midsize carriers are rapidly growing and offering consumers new options for mobile service. MetroPCS and Leap have been achieving market penetration rates of anywhere from 8 to 13 percent in those markets where they have been offering service for at least five years.[13] Both Leap and Metro have strong financial and spectrum positions that they could easily leverage to increase market share and expand their footprints further. Indeed, Leap already has significant spectrum holdings and far-reaching roaming agreements that provide it with nearly national coverage[14] and with its

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[10] *Declaration of Robert W. Hahn and Hal J. Singer*, Reply Comments of CTIA, WT Docket No. 08-27 (Apr. 10, 2008) at Appendix A ("*Hahn and Singer Declaration*").

[11] Hahn and Singer Declaration at ¶23.

[12] Written Submission of Verizon Wireless to the Committee on Energy and Commerce Subcommittee on Communications, Technology and the Internet, U.S. House Of Representatives, Hearing on "An Examination of Competition in the Wireless Industry" (May 21, 2009) attached at Appendix A. ("*House Commerce Subcommittee Testimony*")

[13] *See* Sharma and Kumar; s*ee also* Macquarie Research Equities, *Prepaid Wireless Services* (May 1, 2009) ("*Macquarie Prepaid Wireless Report")* at 12.

[14] "New Markets," CEO Letter, Leap 2008 Annual Review, *available at* http://www.leapwireless.com/ar2008/pdf/ceo_letter.pdf at 2 *("Leap CEO Letter*"); *see also* Press Release, Leap Wireless International, Inc., *Cricket Footprint Grows with*

partner, Denali Spectrum, LLC, it won 100 licenses in the AWS-1 auction. Metro and Leap have also entered a nationwide roaming agreement that covers the companies' existing and future markets, "which the parties expect could ultimately encompass virtually all of the top 200 markets in the nation."[15]

Both MetroPCS and Leap have had strong results in recent quarters. For the first quarter of 2009 Metro PCS reported that sales rose 20 percent,[16] that it had the highest

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Premium Extended Coverage, Forming Largest Roaming Coverage Area for a Low-Cost, Unlimited Carrier (Nov. 13, 2008), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1226044&highlight ("*Leap November 13 Press Release*") (explaining that Leap "has significantly expanded the size of its Cricket footprint with the availability of Premium Extended Coverage," which is a strategic roaming program which "gives [Leap] the largest unlimited roaming coverage area of any low cost, unlimited carrier" through "[s]trategic roaming partnerships with 14 wireless companies.")

[15] Press Release, Leap Wireless International, Inc., *Leap Wireless International, Inc. and MetroPCS Communications, Inc. Enter into National Roaming Agreement and Spectrum Exchange Agreement and Settle Litigation* (Sept. 29, 2008), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=95536&p=irol-newsArticle&ID=1203114&highlight= (emphasis added) ("*Leap-MetroPCS Roaming Press Release*"). Leap recently explained that the roaming agreement with MetroPCS will significantly advance its competitive presence. *See* Jonathan Sidener, *Something to Talk About*, San Diego Union Tribune (Apr. 12, 2009), *available at* http://www3.signonsandiego.com/stories/2009/apr/12/lz1b12leap224820-something-talk-about/?zIndex=80927 ("While it does not match the footprints of the top four wireless companies, [the roaming agreement with Metro] provides a solution for most of the no-contract demographic, Leap says."); *see also* Cricket Wireless Coverage, http://www.cellularmap.net/cw.shtml (map depicting Leap's wide-ranging roaming coverage). *See also* Written Testimony of Robert J. Irving, Jr., before the U.S. House of Representatives Subcommittee on Communications, Technology and the Internet Committee on Energy and Commerce (May 7, 2009) at 9-10 ("[W]e have built a network covering almost 84 million individuals in 32 states, and we are steadily expanding into new markets.").

[16] Victor Godinez, *Richardson's MetroPCS plans to build on niche with frugal cellphone users*, The Dallas Morning News (June 2, 2009). *See also* Press Release, MetroPCS, *MetroPCS Reports First Quarter 2009 Results, Industry Leading High-Growth, Low Cost Structure, Results in Record First Quarter Adjusted EBITDA* (May 7, 2009), *available at* http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&ID=1285538&highlight= ("*May 7, 2009 MetroPCS Press Release*") (last accessed June 15, 2009).

share of gross subscriber additions of any U.S. carrier in operating markets in the aggregate[17] and that it had a 51 percent increase in year over year consolidated net additions and a 59 percent increase in year over year consolidated gross additions.[18] Leap's "year-over-year customer growth rate of 34 percent was the second highest in the wireless industry" and as part of this growth, Leap's "service revenues rose 23 percent for the year to $1.7 billion."[19] As Leap itself describes its position, "Our business is well positioned. We're expanding our role as a value-leader in the wireless space. . . . We've assembled significant assets at the right time. We have adequate financial resources and an attractive spectrum portfolio." [20]

2. Prepaid and no-contract options for consumers continue to grow. Much of MetroPCS's and Leap's growth is attributable to continuing expansion of the "unlimited" and prepaid wireless segment of the industry. Interest in these plans may be partially due to the economic downturn, but some observers believe that consumers are turning to prepaid plans not just for value, but to give them more flexibility.[21] According to some

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[17] May 7, 2009 MetroPCS Press Release.

[18] Press Release, MetroPCS, *MetroPCS Releases First Quarter 2009 Subscriber Results* (April 7, 2009), *available at* http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&ID=1274006&highlight= (last accessed June 15, 2009)..

[19] Leap CEO Letter at 1. Further, the investment community has recognized that "Leap issued [an] encouraging 2009 outlook, calling for some of the strongest growth in the industry," and has concluded that "the company is well positioned to achieve these targets from ongoing market expansion plans." *See* "Leap Wireless: Positive Outlook for 2009," Morgan Stanley (Mar. 2, 2009).

[20] "Leap – Q4 2008 Leap Wireless International Earnings Conference Call," Final Transcript (Feb. 26, 2009), *available at* http://seekingalpha.com/article/123043-leap-wireless-international-inc-q4-2008-earnings-call-transcript?page=7.

[21] W. David Gardner, *Interest In Prepaid Wireless Booming,* Information Week (June 11, 2009) http://www.informationweek.com/story/showArticle.jhtml?articleID=217800828 (last accessed June 12, 2009).

reports, approximately 34 percent of the growth of the wireless industry in 2008 came from a variety of prepaid plans, with the expectation that this growth will continue throughout 2009.[22] Larger carriers are responding to this competition with changes to their postpaid offerings. Verizon Wireless, for example, began last year to offer its customers a new "Month-to-Month" agreement, giving them the freedom to purchase new devices at full-retail price, or use their own CDMA devices without the commitment of a one- or two-year contract. Customers on month-to-month contracts are also permitted to terminated their agreement at the end of any month without paying an early termination fee.[23]

Facilities-based carriers are not alone in this segment. Tracfone, for example, has introduced its prepaid product, "Straighttalk."[24] Moreover, the prepaid activity is not confined to voice and messaging services. Leap Wireless offers an unlimited pay-as-you-go wireless broadband service for $40 per month.[25] Last week Virgin Mobile announced that it will offer "Broadband2Go," a national pay-as-you-go mobile broadband service, running over Sprint's EV-DO Rev. A network.[26] Neither service requires a contract. One

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[22] Macquarie Prepaid Wireless Report at 1 ("Overall, we expect additional entrants and competition in the prepaid segment over the next year.").

[23] Press Release, Verizon Wireless, *No Contract Required — New Month-To-Month Agreement Gives Verizon Wireless Customers Even More Freedom* (Sept. 22, 2008), *available at* http://news.vzw.com/news/2008/09/pr2008-09-22b.html.

[24] Leslie Cawley, *TracFone offers new cut-rate prepaid cell Plan*, USAToday Technology Blog, http://blogs.usatoday.com/technologylive/2009/06/tracfone-offers-new-cutrate-prepaid-cell-plan.html (posted June 4, 2009) (last accessed June 15, 2009).

[25] Marguerite Reardon, *Virgin Mobile to Offer Pay-As-You-Go Broadband*, CNET News (June 11, 2009) http://news.cnet.com/8301-1035_3-10263033-94.html (last accessed June 12, 2009).

[26] Press Release, Virgin Mobile, *Virgin Mobile USA to Introduce Broadband2Go* (June 10, 2009) *available at* http://virginmobileusa.marketwire.com/easyir/prssrel.do?easyirid=13135DE328B72AB2

analyst predicts that the advent of these services is a sign of the changing dynamic and new fronts of wireless competition.[27]

II. COMPETITION WILL CONTINUE UNABATED IN THE NEXT GENERATION OF MOBILE WIRELESS.

Robust competition will continue in the deployment of next generation broadband wireless services as well, because carriers will compete to win and retain customers who want the high speeds and applications that next-generation wireless broadband technologies promise. As one analyst stated, "We believe calls for the end of wireless growth are premature. Although voice adoption is slowing, faster and more-standardized data networks, paired with falling costs for embedded wireless modules, are creating new business opportunities across the consumer and enterprise spectrum."[28]

Clearwire, the joint venture of the third largest carrier, Sprint-Nextel, and its Silicon Valley partners, Google and Intel, is the first wireless firm to deploy 4G services.[29] In the last year, Clearwire launched mobile WiMax services in Portland, Oregon, and Baltimore, Maryland. Clearwire intends to cover up to 120 million pops in more than 80 markets by the end of 2010 and has indicated that it is testing Voice over

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&version=live&prid=510059 (*"Virgin Mobile June 10, 2009 Press Release")* (last accessed June 15, 2009).

[27] *See Lowenstein: Is TracFone the New Southwest Airlines of Wireless?* FierceWireless, http://www.fiercewireless.com/story/tracfone-new-southwest-airlines-wireless/2009-06-03 (June 3, 2009).

[28] Macquarie Emerging Devices Report at 1.

[29] News Release, Clearwire *Clearwire Completes Landmark Transaction with Sprint Nextel to Combine 4G Mobile WiMAX Businesses,* http://newsroom.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1230786&highlight= (Nov. 28, 2008),("The company is building the first, nationwide 4G mobile Internet network, bringing together an unprecedented combination of speed and mobility.")

Internet Protocol (VoIP) in Portland, and looking at introducing mobile voice services.[30] Sprint-Nextel executives speculate that Clearwire has a 4G time-to-market advantage of 18-24 months over competitiors and that its superior spectrum position gives it a clear advantage for offering next generation services.[31] Clearwire executives also consistently refer to its significant spectrum resources as a "crucial differentiator."[32] Clearwire's chief executive recently said that "[a]s a result of our combination with Sprint's 4G business unit Clearwire now holds a nationwide spectrum portfolio that includes many times more spectrum that is available for 4G services than that of any other wireless carrier. In our business, more spectrum means more capacity and greater speeds which equals more opportunity."[33] In short, Clearwire is "positioned to capitalize on the opportunities resulting from the intersection of these compelling trends due to our next generation

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[30] *See* Wireless, Communications Daily, Apr. 3, 2009; *Clearwire Continues Expansion, Targets Applications*, Communications Daily (Apr. 22, 2009)

[31] *See* Paul Kirby, *Sprint Nextel Officials Bullish on 4G Future,* TR Daily (May 20, 2009); *see also* Yu-Ting Wang, *Sprint Eyes Becoming Mobile Date Leader with 4G,* Communications Daily (May 21, 2009). Clearwire has made apparent that it considers wireless providers in the 700 MHz, cellular, and PCS bands as its competitors in the market for wireless broadband and data services. *See* Applications of Sprint Nextel Corporation and Clearwire Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 08-94, Lead File No. 0003462540, Description of the Transaction and Public Interest Statement (filed June 6, 2008, amended June 24, 2008) at 54-56.

[32] Kevin Fitchard, *Clearwire's Wolff embraces 4G but touts spectrum position*, Telephony Online (Apr. 2, 2009), *available at* http://blog.telephonyonline.com/bloglive_ctia/2009/04/02/clearwires-wolff-embraces-4g-as-a-whole-but-touts-spectrum-position/.

[33] *See* http://seekingalpha.com/article/124559-clearwire-corporation-q4-2008-earnings-call-transcript, Clearwire 4Q Earnings Call Transcript (March 5, 2009) at 1 ("*Clearwire 4Q Earnings Call Transcript*").

technology and network architecture, our deep spectrum holdings and our unique business model."[34]

Verizon Wireless, AT&T, Cox Communications and Metro PCS have all announced plans to deploy LTE.[35] For example, Verizon Wireless, which invested billions of dollars to make not one but two major 3G network upgrades, is now building a 4G network that will increase tremendously mobile wireless uplink and downlink speeds. In 2009 and beyond, Verizon Wireless will invest billions of dollars to deploy long term evolution ("LTE") technology on 700 MHz spectrum for which it paid the Government more than $9 billion. It is the first carrier – in the U.S. or abroad – to test and deploy LTE. AT&T also is taking interim steps to upgrade its current 3G High Speed Packet Access ("HSPA") network to faster speeds,[36] presumably as a response to competitive pressure from other providers' rapid deployment of both WiMax and LTE.

All of these trends underscore that the competitive forces in the wireless industry can be expected to continue as carriers invest in broadband infrastructure to offer their customers even faster and more robust services, features and applications.

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[34] *See* Clearwire 4Q Earnings Call Transcript at 7.

[35] *See* Press Release, Verizon Wireless, *Verizon Selects LTE As 4G Wireless Broadband Direction, Technology Platform to be Trialed in 2008* (Nov. 29, 2007), *available at* http://news.vzw.com/news/2007/11/pr2007-11-29.html; Marin Perez, *MetroPCS Chooses LTE For 4G Wireless Network*, InformationWeek, Aug. 13, 2008, *available at* http://www.informationweek.com/story/showArticle.jhtml?articleID=210003630; Press Release, *AT&T, AT&T Acquires Key Spectrum To Set Foundation For Future Of Wireless Broadband, More Choices For Customers* (Apr. 3, 2008), *available at* http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=25428; Press Release, Cox Communications, *Cox to Launch Next Generation Bundle with Wireless in 2009* (Oct. 27, 2008), *available at* http://media.corporate-ir.net/media_files/irol/76/76341/release102708.pdf.

[36] Kevin Fitchard, *AT&T Doubling 3G Capacity*, Telephony Online (Apr. 20, 2009).

III. THE COMMISSION'S COMPETITION REPORTS TAKE THE APPROPRIATE ANALYTICAL APPROACH TO MEASURING COMPETITION IN THE WIRELESS INDUSTRY.

The Commission produces a detailed and comprehensive annual analysis of the industry, using an appropriate framework for reviewing competitive markets that is faithful to Congress's direction in Section 332(c)(1)(C) of the Communications Act. No static measure, such as that dictated by statute for the cable industry,[37] could produce as comprehensive an analysis as what the Commission currently generates. Unlike the annual report it required for the cable industry, Congress allowed the Commission flexibility to report on CMRS competition rather than set hard and fast criteria.[38] The Commission should thus continue to use the same approach for its 2009 review, and should not adopt specific criteria for measuring effective competition that quickly would become outmoded.[39]

The Commission has performed an increasingly more rigorous analysis of the structure and performance of the wireless market. Just as competition in the industry has grown more robust, so too have the Commission's CMRS competition reports, adding new areas of discussion and deeper review of issues as the industry has matured. When

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[37] *Public Notice* at 3 ("Are there elements of the effective competition definition for the cable industry in Section 623(l)(1) that should be applied to the CMRS industry?")

[38] Congress had adopted the effective competition standard for cable in 1992, so it easily could have considered as specific a standard for the mobile wireless industry.

[39] Verizon Wireless also believes that profitability measures would provide no meaningful information regarding competition in the wireless industry. *See Public Notice* at 12. It is not clear how the Commission could determine economic profits, since accounting profits are not necessarily economic profits. *See e.g.,* Franklin M. Fisher and John J. McGowan, *On the Misuse of Accounting Rates of Return to Infer Monopoly Profits*, the American Economic Review (March 1983). Verizon Wireless and other wireless providers use much of the accounting profits generated each year to respond to competitive pressure and build, expand and continuously upgrade the network.

the Commission released its first report in 1995, it was before personal communications services (PCS) were widely launched, so the report covered only the cellular market, primarily looking at price and entry by new competitors. The second report was slightly more detailed, in discussing the new entrants that the recent PCS auctions would bring and the introduction of digital technology in cellular markets. Intra-industry competition was still relatively new, so that the majority of the report discusses competition within services or between cellular and PCS or cellular and specialized mobile radio service (SMR), with little discussion of intermodal competition.

In the *9th Competition Report* in 2004[40] the Commission enhanced its analysis "by reorganizing the presentation of the various indicators to conform to a framework that groups such indicators into four distinct categories (A) Market Structure, (B) Carrier Conduct, (C) Consumer Behavior, and (D) Market Performance."[41] It concluded then and in subsequent reports that the "[u]se of this framework has the advantage of providing a systematic approach to addressing the four statutory requirements."[42] The Commission's last five reports are thus quite detailed, examining the following areas that were not mentioned in the early years:

- barriers to entry (spectrum policy, auctions, advertising costs, economies of scale, and access to outside financing)
- rural competition
- non-price provider conduct (advances in technology, capital expenditures, marketing, network quality, data)

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[40] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Ninth Report*, 19 FCC Rcd 20597 (2004) ("*9th Competition Report*").

[41] *9th Competition Report* at ¶ 8.

[42] *Id.*

- consumer behaviors (churn & local number portability)
- detailed discussion of pricing trends to include minutes used and data usage
- penetration rates and intermodal competition.

Beginning with its *12th Competition Report* in 2007, the FCC has looked at wireless competition in each census block, of which there are over 8 million in the United States. This has allowed for a more granular, and thus more accurate, assessment of wireless coverage in specific areas.[43] Even when assessed at this very exacting standard, the Commission found in the *13th Competition Report* that 99.6% of the total U.S. population has access to one or more different mobile service providers in the census blocks in which they live, and 98.5% of the U.S. population living in rural census blocks have that access.[44] These and other data led the Commission to conclude that "U.S. consumers continue to reap significant benefits – including low prices, new technologies, improved service quality, and choice among providers – from competition in the CMRS marketplace, both terrestrial and satellite CMRS."[45]

The Commission's current approach fully discharges its obligation under Section 332(c)(1)(C) of the Act. The Commission should follow that same approach in compiling this year's report.

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[43] The Commission applied this approach in part in response to concerns that interim Chairman Copps raised that examining competition on a county level would mislead as to the true extent of wireless coverage in the United States. *See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Eleventh Report,* WT Docket 06-17, 21 FCC Rcd 10947 (2006) ("*11th Competition Report*") Concurring Statement of Commissioner Michael J. Copps at 1.

[44] *13th Competition Report* at 5.

[45] *13th Competition Report* at 1.

IV. THE COMPETITIVE WIRELESS HANDSET MARKET CONTRIBUTES TO COMPETITION AMONG CMRS PROVIDERS.

The Commission seeks information on the role of handsets in the CMRS market, including how wireless service providers use innovations in handsets features and design as a way to compete.[46] The wireless handset industry underscores the vigorous competition that pervades wireless services. As carriers compete to win and retain customers, they and handset suppliers invest in innovative devices that they believe will appeal to customers, while innovation itself drives growing demand. This "virtuous cycle" promotes competition as well as expanded choices and services for customers.

The U.S. handset market is characterized by significant competition among about three dozen well-established and newer manufacturers, including Motorola, Nokia, LG, Samsung, Research in Motion, Palm, HTC, and ZTE.[47] From these manufacturers, hundreds of wireless phones and devices are available to U.S. consumers.[48] CTIA recently noted that U.S. consumers have access to 630 different wireless handsets and devices, compared to, for example, less than 150 in the United Kingdom.[49]

There are also multiple competing channels of distribution for wireless handsets. Equipment manufacturers offer their products to consumers through many channels, including big box stores, wireless providers, and the manufacturers' own websites. In short, consumers have many handset choices, and they can and do make selections of

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[46] *Public Notice* at 9-10.

[47] *See, e.g.,* Michael L. Katz, "An Economic Analysis of the Rural Cellular Association's Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers," at 18-19 (Feb. 2, 2009), attached to Comments of AT&T on RCA Petition, RM-11497 (filed Feb. 2, 2009) ("*Katz Declaration*").

[48] *Id.* at 19-20.

[49] CTIA May 12 Letter, at 2 and accompanying charts.

handsets and providers based on what handsets and/or handset features and functions they find attractive.

Wireless service providers use handsets and handset features as a means to differentiate themselves, a characteristic of a competitive market. In today's mobile wireless industry, where penetration levels are high and differences among carriers on other factors such as coverage have decreased,[50] handsets offer a rich opportunity for competitive marketing of new designs or technologies or features or applications linked to the burgeoning market for "app stores" to attract consumers. Therefore, the handset has become a key factor in the selling of a specific CMRS brand and in a customer's purchasing decision.[51] According to one study, the number of consumers choosing a wireless carrier based on handsets has grown by 51 percent since 2004.[52]

Competition among service providers to offer handsets that are popular with consumers has repeatedly produced innovations in technology and features that benefit consumers and the wireless industry generally. The fastest growing segment of the handset market is for smartphones.[53] One source recently predicted that mobile broadband subscribers will represent one-third of all mobile subscribers worldwide by

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[50] Mark Lowenstein, "Evolving Role of Handsets in the U.S. Wireless Industry," at 4-6 (Jan. 2009), Attachment A to Comments of Verizon Wireless Requesting Dismissal or Denial of Petition, RM-11497 (filed Feb. 2, 2009) ("*Lowenstein Paper*").

[51] *Id.* at 4.

[52] *Id.* at 6.

[53] *See, e.g.,* Steve Lohr, *Smartphone Rises Fast from Gadget to Necessity*, New York Times, June 10, 2009, at B1.

2013.[54] And, to fuel this shift, there is no shortage of competing smartphones from multiple manufacturers. Some examples available in 2008 include:

- AT&T: Apple iPhone; Blackberry Bold
- Verizon Wireless: LG Voyager; Blackberry Storm
- T-Mobile: G1 (Google Android); Blackberry Pearl Flip
- Sprint: Palm Centro; Samsung Instinct
- Helio: Ocean[55]

In February 2009, economist Michael Katz prepared a comprehensive analysis documenting the vigorous competition in the wireless device industry.[56] He concluded that no single manufacturer or service provider has sufficient market power in its respective market to control the wholesale or retail distribution chain or prevent a handset manufacturer from working with its wireless carrier competitors. "This is not a marketplace in which there is a single, dominant distributor that has obtained exclusive distribution rights. Rather, many different carriers have negotiated exclusive rights to distribute individual handsets from many different manufacturers."[57] Indeed, as the above list indicates, manufacturers and service providers are churning out many forms of, and variations on, the smartphone concept to attract consumers. Smaller wireless carriers offer similar products. Dr. Katz noted that, among 51 members of the Rural Cellular

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[54] Lynette Luna, *Informa: Mobile Broadband Will by Growth Engine by 2013,* Fierce Wireless (Mar. 26, 2009) http://www.fiercebroadbandwireless.com/story/informa-mobile-broadband-subs-will-make-one-third-worldwide-subs-2013/2009-03-26. (last accessed June 15, 2009).

[55] Lowenstein Paper at 5.

[56] Katz Declaration.

[57] *Id.* at 3.

Association, "all offer one or more phones with Internet access, and 38 offer one or more phones with touch screens."[58]

Some aspects of handset availability are influenced by the network provider's choice among air interface technologies. U.S. wireless devices are currently broadly divided between CDMA, GSM and iDEN technologies that are not interoperable. AT&T operates a GSM network, and the Apple iPhone is only marketed in the United States as a GSM device. Sprint Nextel offers Motorola push-to-talk devices using iDEN technology, which is generally not available through other providers. In both cases, these devices can only be purchased for use on networks of carriers that use the same technology. This technological differentiation provides additional incentives for carriers and manufacturers to innovate in handset choices, for example, push-to-talk handsets that compete with Sprint's iDEN service.

In Europe, where use of GSM technology is standardized, consumers may have more device choices, simply because more GSM phones are manufactured globally.[59] However, U.S. consumers have access to more diverse handsets and more multi-band and multi-mode phones in addition to their fair share of innovative devices, including the iPhone and many Blackberry and Treo models that are introduced in the United States first.[60] Also, "[s]ome of the most feature-rich 3G handsets are either only available in the U.S. or have been specially developed for the market here."[61] The technical diversity has

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[58] *Id.* at 20.

[59] *See* Mark Lowenstein, "Comparisons Between U.S. and European Markets for Wireless Services and Devices: Myth vs. Reality," at 3 (July 2007), Attachment to Verizon Wireless Ex Parte Letter, RM-11361 (filed Aug. 28, 2007).

[60] *Id.* at 4.

[61] *Id.*

allowed U.S. carriers to differentiate themselves, whether through exclusive handsets or exclusive features on more generic handsets, all to the benefit of U.S. consumers who can obtain more innovative devices.

The Commission asks to what extent "equipment vendors and/or retailers selling products that at least in part rely on a wireless broadband connection but do not require a long-term contract?"[62] As mentioned above, Virgin Mobile USA recently announced that the launch of Broadband2Go, "a 3G nationwide wireless Internet service without an annual contract, monthly subscription or activation fee," building on its existing prepaid phone service.[63] The Virgin Mobile service allows customers to purchase data usage from 100 MB to 1 GB on the pay-as-you-go model. Leap Wireless also offers an unlimited pay-as-you-go wireless broadband service for $40 per month.[64] Verizon Wireless offers a $15 DayPass for 24-hour access on its Mobile Broadband service when the customer purchases a mobile broadband device at full retail price without a monthly service plan. Given the increasing popularity of pre-paid services and smartphones, non-contract broadband service alternatives are likely to appear from multiple providers.

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[62] *Public Notice* at 10.

[63] Press Release, Virgin Mobile, Virgin *Mobile USA to Introduce Broadband2Go* (June 10, 2009) *available at* http://virginmobileusa.marketwire.com/easyir/prssrel.do?easyirid=13135DE328B72AB2&version=live&prid=510059 (*"Virgin Mobile June 10, 2009 Press Release"*) (last accessed June 15, 2009).

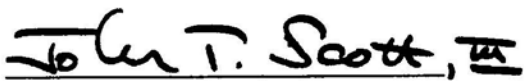
[64] Marguerite Reardon, *Virgin Mobile to Offer Pay-As-You-Go Broadband*, CNET News (June 11, 2009) http://news.cnet.com/8301-1035_3-10263033-94.html (last accessed June 12, 2009).

V. CONCLUSION

The Commission's finding of effective competition in the CMRS market in its January 2009 annual report remains accurate. The past year has seen continued, vigorous competition, marked by the rapid growth of new plans, devices and features which are offered by a wide variety of providers. Customers are clearly benefiting from this intense competition, and have ever-expanding choices for meeting their communications and information needs.

Respectfully submitted,

VERIZON WIRELESS

By: 

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Appendix A

COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY AND THE INTERNET

U.S. HOUSE OF REPRESENTATIVES

Hearing on "An Examination of Competition in the Wireless Industry"

WRITTEN SUBMISSION OF VERIZON WIRELESS

May 21, 2009

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WRITTEN SUBMISSION OF VERIZON WIRELESS

Verizon Wireless thanks the Subcommittee on Communications, Technology and the Internet for the opportunity to make this submission for inclusion in the record of the Subcommittee's May 7, 2009, hearing on competition in the wireless industry.

SUMMARY

In 1993, this Subcommittee and the full Congress established a deregulatory framework for the wireless industry.[1] This limited regulatory approach led to explosive growth in innovation, competition, and investment in wireless networks, providing huge benefits to the national economy. Companies are constantly expanding services and benefits to customers because they know they must fight fiercely to attract and retain those customers. As the FCC found in January 2009, "U.S. consumers continue to reap significant benefits – including low prices, new technologies, improved service quality, and choice among providers – from competition in the CMRS marketplace, both terrestrial and satellite CMRS."[2] *Consumer Reports* declared the same month that there is a "surge in satisfaction" among cellular customers, and that "Overall, cell-phone service has become significantly better. … Sixty percent of readers were completely or very satisfied with their service."[3] And this week, the American Customer Satisfaction

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[1] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312. As the FCC stated, the "overarching congressional goal" of this statute was "promoting opportunities for economic forces – not regulation – to shape the development of the CMRS market." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Third Report and Order,* 90 FCC Rcd. 7988, 8012 (1994).

[2] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Thirteenth Report*, WT Docket No. 08-27, FCC 09-54 (released January 16, 2009) (hereinafter "Thirteenth CMRS Competition Report"), at 5.

[3] Consumer Reports, "Best Cell-Phone Service," January 2009, at 28.

Index, an organization that measures customer satisfaction with the quality of various products and services, reported that "Customer satisfaction with wireless telephone services reaches a new all-time high for the third consecutive year."[4]

As Chairman Boucher noted in his opening statement, "daily, new, attractive and useful applications are added to wireless services and data rates continue to increase ensuring that consumers can obtain faster access to mobile applications." The Chairman defined the Subcommittee's task as examining "possible ways in which federal telecommunications policy may be adjusted in light of these developments with the goal of enhancing the consumer experience and facilitating the future growth of mobile services."

Verizon Wireless supports the Subcommittee's effort. We offer below four specific actions that Congress should take to promote the further growth of wireless infrastructure, and to unlock the tremendous potential for Fourth Generation ("4G") broadband services to serve consumers, businesses and the public safety community:

1. Adopt national consumer protection rules that will provide the industry and consumers with a single, consistent set of requirements. This framework would end the harmful impact of patchwork state utility-style regulation, while preserving states' authority to police unfair or deceptive wireless company practices – just as they can police such practices by other industries.

2. Streamline the long and cumbersome siting process for wireless facilities that directly impedes improved public safety and commercial services. Congress should impose deadlines for zoning decisions on new towers as well as antenna collocations on existing towers, and take additional actions to expedite more reliable and expanded service to public safety agencies and individual consumers.

3. Direct NTIA and the FCC to identify government and commercial spectrum that is suitable for broadband services, so that this spectrum can be licensed and

[4] "ACSI: Customer Satisfaction Rises Again, Now Jointed by Other Economic Indicators," May 19, 2009 (http://www.theacsi.org/images/stories/images/news/0901q_Press_Release.pdf). ACSI also reported that satisfaction with Verizon Wireless jumped 3% "to continue its lead over the industry."

cleared in sufficient time to make it available to meet the burgeoning demand for wireless communications.

4. Designate the D Block of the 700 MHz band for public safety licenses, in order to provide the nation's first responders with immediate access to spectrum to meet their future broadband needs.

During the May 7 hearing, however, some parties advanced proposals for new regulation that will not promote wireless investment and innovation, but will instead harm them. Government should always proceed cautiously with new regulation. Caution is imperative when regulation would be imposed on competitive enterprises, particularly those that are making major investments to meet consumers' needs despite a major economic recession. Unfortunately the actions proposed at the hearing would constitute the most intrusive and harmful form of Government intervention – economic regulation of private contracts among businesses. They would drag the Government into setting some of the prices, terms and conditions of commercial agreements. There is no factual or policy basis for taking these actions – and ample reason not to do so.

- Neither Congress nor the FCC should regulate the terms of device supply arrangements between manufacturers and providers. Exclusivity arrangements are common throughout the American economy (and statutorily mandated for patent holders), and drive innovation. Restricting them would clearly undermine innovation and disserve consumers. Moreover, Verizon Wireless has offered to limit exclusivity for devices manufactured by two of its largest suppliers – LG and Samsung – for a period not to exceed six months so that smaller carriers can gain access to those devices sooner.

- Congress and the FCC should also not expand regulation of roaming agreements among wireless companies to mandate home roaming or include all data services. The Commission's existing regulation, supplemented by the right of any company to file a complaint seeking relief from unreasonable or discriminatory roaming practices, has served consumers well. By intruding into the terms of commercial agreements, additional roaming rules would discourage providers from investing in their own networks by allowing companies to improperly piggyback off the investments of competitors.

- Finally, there is no basis for the FCC to intervene in the wireless backhaul market by reimposing price regulation. Wireless providers have a steadily increasing array of competing wireless as well as wireline backhaul providers to choose from, and prices for backhaul capacity are declining.

WIRELESS COMPETITION AND INNOVATION ARE SERVING CONSUMERS

The 1993 amendments Congress made to the Communications Act placed the wireless industry on a path toward innovation, expanded service, and competition that has well served consumers and the American economy. Wireless companies compete against each other every day to win and retain customers, and consumers and the economy have benefited enormously from this competition. For example:

- The FCC has consistently found that despite the consolidation that has taken place, the CMRS industry remains competitive and carriers continue to behave in a competitive manner. As recently as January 2009, in its annual report to Congress on the wireless industry, the FCC provided more than 150 pages of data to support its central findings that there is "effective competition" in the industry, and that "U.S. consumers continue to reap substantial benefits – including low prices, new technologies, improved service quality, and choice among providers," from that competition.[5]

- Consumers are paying less today than they did 10 years ago while enjoying almost seven times as many minutes of use per month.[6]

- One study found that in 2006, approximately 3.6 million U.S. jobs were directly or indirectly dependent on the U.S. wireless industry, and that an additional 2-3 million jobs will be created in the next 10 years.[7]

- To secure and retain customers, providers know they must invest in networks. CTIA reports that as of June 2007, the wireless industry had invested more than $233 billion (excluding the cost of spectrum) in building networks to deliver an

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[5] Thirteenth CMRS Competition Report at 5-11.

[6] Letter from Christopher Guttman-McCabe, CTIA, to Secretary, FCC, PS Docket No. 06-229, January 28, 2008 (CTIA January 28 Letter"), at 2.

[7] Entner, Roger and David Lewin, *"The Impact of the US Wireless Telecom Industry on the US Economy,"* Ovum-Indepen, September 2007, at 3.

increasing array of services to consumers, and the pace of substantial investment is continuing.[8]

- Driven by the imperative of retaining customers, providers have taken numerous pro-consumer actions, including adhering to CTIA's Consumer Code, which sets forth detailed practices that members must follow in marketing their services and in billing customers. In part due to these efforts, consumer complaints to federal and state regulators are few. During each month in 2008, the rate for complaints from Verizon Wireless's customers to the FCC, state PUCs, or state Attorneys General was about 8 complaints for every 1 million customers – a rate of only 0.0008%.

- Over 630 different handsets, manufactured by at least 33 companies, are sold in the U.S., and consumers have access to over 40,000 applications sold through numerous application stores.[9]

One of the witnesses at the hearing asserted that U.S. consumers fare worse than European consumers, but another witness disagreed.[10] Data demonstrate that in fact, U.S. consumers enjoy lower prices and stronger competition:

- A recent study found that the price per minute of service in the U.S. is the lowest among 26 OECD countries, that U.S. customers have the highest minutes of use per month, and that the U.S. has the most competitive market among those 26 countries. [11]

- U.S. consumers have access to more innovative devices, including the iPhone and many Blackberry and Treo models that are introduced here first. CTIA notes that in the last 18 months, many of the most advanced handsets have been launched in the United States, including Apple's iPhone 3G, LG's Voyager, Samsung's Instinct, Google's G1, and four Blackberry devices (Blackberry Storm, Blackberry Bold, Blackberry Pearl Flip and Blackberry Curve 8900).[12]

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[8] CTIA January 28 Letter, at 2.

[9] Letter from Chistopher Guttman-McCabe, CTIA, to Secretary, FCC, WC Docket No. 07-52, May 12, 2009 ("CTIA May 12 Letter"), at 2 and accompanying charts. We understand that CTIA has provided copies of this letter to the Subcommittee.

[10] Written Testimony of Chris Murray, Senior Counsel, Consumers Union, May 7, 2009. Compare Written Statement of George S. Ford, Chief Economist, Phoenix Center for Advanced Legal and Economic Public Policy Studies, May 7, 2009.

[11] Merrill Lynch, "Global Wireless Matrix 4Q08," cited in CTIA May 12 Letter, at 3-4.

[12] CTIA May 12 Letter, at 11.

- Two studies filed with the FCC found numerous comparative advantages that U.S. consumers enjoy. One concluded, "A comparison of international statistics suggests that the U.S. wireless market, in fact, leads its European counterparts, and the U.S. wireless market, compared to Europe, appears to be more competitive and vibrant."[13]

Wireless companies do not need regulation to incent us to protect our customers – we do it on our own. Verizon Wireless has brought numerous lawsuits against spammers, telemarketers, pretexters, and others who seek to deceive and defraud our customers. Earlier this month, for example, Verizon Wireless filed civil suits against two companies harassing its customers by selling automobile warranties. It also reached a settlement with several other companies which committed to stop illegal spoofing and telemarketing in selling auto warranties, and donated the settlement proceeds to charity. Verizon Wireless took these actions before the Federal Trade Commission brought its own lawsuits earlier this month against purveyors of these warranties.

Innovation is obvious not only in the hundreds of new devices, features and applications that consumers can obtain every year, but also in the deployment of new technologies that allow them to send and receive data at faster speeds. Verizon Wireless, for example, has invested billions of dollars to make not one but two major 3G network upgrades, and is now building an even faster 4G network. First, we implemented EvDO Rev 0, which offered customers average download speeds in the range of 400-700 Kbps. We then again upgraded our network to EV-DO Rev A, which further increases speeds and enables customers the ability to send and receive files much faster than before. With

[13] American Consumer Institute, "Comparison of Structure, Conduct and Performance: U.S. versus Europe's Wireless Market (August 22, 2007); http://www.theamericanconsumer.org/2007/08/22/comparison-of-structure-conduct-and-performance-us-versus-europe%e2%80%99s-wireless-markets/; see also Mark Lowenstein, "Comparisons Between U.S. and European Markets for Wireless Services and Devices: Myth vs. Reality", attached to Letter from John T. Scott, III, Verizon Wireless, to Secretary, FCC, RM-11361, filed August 28, 2007.

Rev A, customers experience average download speeds of 600 Kbps to 1.4 Mbps and average upload speeds of 500-800 Kbps. This translates to being able to download a 1 Megabyte e-mail attachment – the equivalent of a small PowerPoint presentation or a large PDF file – in about eight seconds and upload the same file in less than 13 seconds, not only while sitting at a desk but also while traveling.

In 2009 and beyond, much of Verizon Wireless's investment will be to deploy 4G LTE technology, which multiplies both up and down speeds many times, using the 700 MHz spectrum we paid the Government nearly $9 billion for last year. We are the first carrier – in the U.S. or abroad – to test and deploy LTE. We plan to have service up and running for customers in 25-30 markets in 2010, with a nationwide deployment completed over the following five years.

The multi-billion dollar investments that we and our competitors are making in jobs and infrastructure are driven by our industry's unstinting effort to demonstrate value to customers through network coverage, service reliability, and the products we offer. This is exactly how free markets are supposed to work, and it validates the significant benefits of maintaining a very limited regulatory framework.

However, there are four concrete actions Congress should take to improve the benefits that consumers and the national economy reap from this competitive, innovative industry: It should enact a national framework for wireless consumer protection, change existing law to expedite tower siting that will provide improved service and speed infrastructure investment, identify new spectrum for broadband, and provide public safety with spectrum for broadband. We stand ready to provide additional information to the

Subcommittee that will help it to develop legislation in these areas, and thereby set a national wireless policy that will support continued growth, investment and innovation.

ACTIONS THAT CONGRESS SHOULD TAKE TO PROMOTE WIRELESS COMPETITION AND INNOVATION

1. Enact a National Framework for Wireless Consumers.

While wireless services are increasingly nationwide, and allow customers to benefit from national rate plans that offer the same prices and services across state boundaries, some states continue to attempt to assert monopoly utility-type regulation over the wireless industry.[14] Left unchecked, these re-regulatory efforts will force wireless carriers to follow different rules in different states and undo the benefits of deregulation – a result antithetical to Congress' goal in 1993.[15]

The wireless industry is an intensely competitive consumer electronics business, no different than Apple and Dell and other high-tech businesses – yet state PUCs do not regulate those companies. Wireless providers should not receive special treatment, only the same treatment accorded other competitive businesses. The federal government is in

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[14] For example, Minnesota sought to regulate wireless prices through a detailed set of requirements for contracts. Although the U.S. Court of Appeals for the 8th Circuit struck down the law in *Cellco Partnership v. Hatch,* 431 F.3d 1077 (8th Cir. 2005), the wireless industry had to fight this attempt to impose utility-type regulation for two years. Yet Minnesota is now proposing another set of wireless-specific rules. The California PUC is proposing onerous rules that would impose outage reporting rules at variance from the comprehensive FCC outage reporting system and require particular materials to be available in stores. New Mexico prohibits certain types of charges on bills that require carriers to have different bill formats and limit products and services carriers can offer to customers in that state.

[15] States and local governments also continue to impose onerous and discriminatory taxes and fees on wireless companies and subscribers. The average combined rate for federal, state and local taxes is more than 15%, and over 20% in Florida, Nebraska, New York and Washington. These rates are well above the rates imposed on other competitive goods and services. Hearing on H.R. 5793, the "Cell Tax Fairness Act of 2008, before the House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Testimony of Scot Mackey, Kimbell Sherman Ellis LLP, September 18, 2008. Consumers would benefit greatly from a national policy that prevents new discriminatory taxes from being imposed. We thus ask the Subcommittee to refer to the Judiciary Committee with a favorable recommendation for H.R. 1521, the "Cell Tax Fairness Act of 2009."

the best position to oversee this national industry, which serves the public across and without regard to state lines.

The answer to patchwork, utility-type regulation is for Congress to complete the job it started 16 years ago, and adopt a national framework for wireless oversight. That framework would direct the FCC to set national consumer protection standards in areas including disclosure of the terms of customer service agreements, service coverage, and billing practices. State PUCs would no longer have authority to impose utility-style regulation on a competitive industry that is nothing like a utility. But the states would retain all of their power through their Attorneys General to protect against unfair and deceptive consumer practices if and when they determine such practices exist, under their generally applicable consumer protection statutes.[16]

National regulation serves the public interest because it benefits all consumers in all states by setting uniform protection and service quality standards for wireless consumers. Individual state-by-state regulation cannot do that. And, it avoids disparate state requirements that raise operational costs and cause uncertainties for companies, create confusion and inconvenience for consumers, delay new services or options that consumers would otherwise enjoy, and discourage investment.

States would not lose power to address unfair and deceptive practices. Under the national framework, states would continue to enforce their consumer protection statutes of general applicability, but would not be able impose state specific wireless regulations. State Attorneys General would thereby lose none of their authority to go

[16] Two witnesses at the May 7 hearing discussed the harms to consumer welfare of state-by-state regulation and the benefits of a single set of rules, and supported national framework legislation. Written Statement of George S. Ford, Chief Economist, Phoenix Center for Advanced Legal and Economic Public Policy Studies, Written Statement of Victor H. "Hu" Meena, President and CEO, Cellular South, Inc., at 11.

after practices that they believe are unfair or deceptive. States may also adopt consumer education programs, refer complaints to carriers for resolution, bring formal complaints against carriers they believe are acting unlawfully, and investigate wireless practices. This new framework will maximize protections to all consumers nationwide, while avoiding the harms of patchwork state-by-state regulation.

Last year, the Subcommittee developed a discussion draft of a national wireless consumer protection bill. We stand ready to work with the Subcommittee to refine that bill to achieve a single set of national consumer protection standards while preserving states' ability to challenge what they believe to be unfair and deceptive practices.

2. Streamline Tower Siting to Expedite Investment in Wireless Infrastructure.

One of the biggest barriers wireless companies face in reaching consumers in unserved and underserved areas, or in adding capacity to meet consumers' needs for more bandwidth, are the costs and delays associated with the laborious tower siting process. Investment suffers from long and unreasonable waiting times for new sites to gain state or local zoning approval. This is a public safety problem as well. Thousands of public safety agencies and first responders depend on reliable and expansive wireless networks to help citizens and respond to emergencies. Public safety agencies also depend on access to new or modified towers to meet their growing needs.

Congress should take steps to eliminate barriers to public safety as well as commercial wireless deployment by placing and enforcing meaningful bounds on the state and local zoning process. These steps would not prohibit lawful zoning practices. But they would expedite investments in wireless infrastructure, thereby meeting Congress' and the Administration's goals of encouraging investment in order to stimulate

the economy and expand broadband's availability to consumers. There are three aspects of the state/local process that need to be fixed.

First, Congress should amend Section 332 of the Act to exempt certain antenna collocations and tower modifications from zoning approval. Companies are often required to seek zoning approval to add new antennas to an existing building or structure or to replace existing antennas, even if the change in appearance of the tower is minor and often invisible. These requirements impact broadband buildout because deploying broadband in new areas often involves locating antennas on existing towers. Congress should amend Section 332(c)(7) of the Communications Act to limit state and local authorities' authority to require zoning approval for collocations that do not result in a "substantial increase" in the tower.[17] Similarly, antenna modifications that do not constitute a "substantial increase" should be excluded from the zoning process.

Second, Congress should amend Section 332 of the Act to impose a "shot clock" on the zoning process. Zoning delays frustrate wireless company efforts to meet FCC buildout requirements and slow deployment of broadband services that will benefit consumers. In July 2008, CTIA thus filed a *Petition for Declaratory Ruling* ("CTIA Petition") asking the FCC to define when a state or local zoning authority has "failed to act" on a zoning application.[18] CTIA, Verizon Wireless and others provided many

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[17] The term "substantial increase" has been defined by the FCC in the context of historic preservation reviews on existing towers to include significant changes in appearance of the tower or its site. *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas,* 16 FCC Rcd 5574, 5577 (Wireless Tel. Bur. 2001) ("*Collocation Agreement*").

[18] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165 (2008).

examples of unreasonable zoning delays and the resulting harm to broadband services.[19] They demonstrated that these delays are particularly unjustified and harmful for changes to existing tower sites in order to improve coverage, add broadband capability, or expand the number of wireless competitors in a community.

To curb these delays and give effect to Section 332(c)(7) of the Act, CTIA asked the Commission to declare that a "failure to act" under this Section has occurred if a zoning authority fails to render a final decision within 45 days on a wireless facilities siting application proposing to collocate on an existing structure or within 75 days for all other applications.[20] If a zoning authority fails to issue a decision within these timeframes, the application will be deemed granted. In the alternative, CTIA asked the Commission to establish a presumption that when a zoning authority cannot explain a failure to act within these time frames, a reviewing court should find a violation of Section 332(c)(7)(B)(ii) and issue an injunction granting the underlying application.

Nearly a year later, the Commission has not acted on CTIA's Petition. While we will continue to urge the FCC to do so, Congress should enact legislation, because unreasonable zoning delays impede expanded public safety as well as commercial communications, and slow investment in infrastructure, directly undermining Congress's and the Administration's economic stimulus and broadband objectives.

Third, Congress should amend Section 253 of the Act to clarify that zoning ordinances that materially interfere with wireless services violate that section. Another cause of delay in expanding wireless coverage is the proliferation of zoning ordinances

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[19] CTIA Petition at 13-16; Verizon Wireless Comments, WT Docket No. 08-165 (filed September 29, 2008) at 6-7; Verizon Wireless Reply Comments, WT Docket No. 08-165 (filed October 14, 2008) at 4-6 (citing examples from other party comments).

[20] CTIA Petition at 24-26.

that are designed to make wireless facilities siting far more difficult or to extract unreasonable fees from wireless companies. The effect of many of these ordinances is to prohibit wireless facilities siting in a particular area, impeding expansion of public safety as well as commercial wireless networks.[21]

Wireless companies should be able to overturn particularly egregious zoning ordinances by showing that the ordinances violate Section 253(a) of the Act by erecting requirements that "*may* prohibit or have of the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[22] Last year, however, the U.S. Court of Appeals for the 9th Circuit reversed its prior interpretation of Section 253(a) and held that that "a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition."[23] This ruling imposes a stricter standard for demonstrating a Section 253(a) violation than the FCC has itself set. While the FCC, joined by several circuits, has required a carrier to show that a local requirement materially inhibits a carrier's ability to compete in a fair and balanced legal and regulatory environment,[24] the 9th Circuit's

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[21] Examples include ordinances which dictate use of a particular technology, set forth no standards for approving wireless tower applications and reserve unfettered authority to the zoning authority, impose unreasonable or impractical minimum parcel size or tower fall zone requirements, impose severe height or coverage limitations, and mandatory review by a consultant (often the very consultant who assisted the locality in drafting the ordinance) with excessive fees for the consultant's services.

[22] 47 U.S.C. § 253(a).

[23] *Sprint Telephony PCS v. County of San Diego*, 543 F.3d 551 (9th Cir. 2008). *See also Level 3 Communications, L.P. v. City of St. Louis,* 477 F.2d 528 (8th Cir. 2007).

[24] *In the Matter of California Payphone Ass'n,* 12 FCC Rcd 14191, 14206 ¶ 31 (1997); *see also In the Matter of Public Utility Commission of Texas,* 13 FCC Rcd 3460, ¶¶ 3, 22, 81 (1997). The FCC's interpretation of Section 253(a) has been endorsed by the First, Second and Tenth Circuits. *See Puerto Rico Tel. Co., Inc. v. Municipality of Guayanilla,* 450 F.3d 9, 18 (1st Cir. 2006); *TCG N.Y., Inc. v. City of White Plains,* 305 F.3d 67, 76 (2nd Cir. 2002); *Qwest Corp. v. City of Santa Fe,* 380 F.3d 1258, 1270 (10th Cir. 2004).

decision effectively requires a showing that the ordinance creates an insurmountable barrier to entry or drives the provider out of a market entirely.

The FCC's construction of Section 253(a) is consistent with both the language and intent of the statute. The statute's preemption of local requirements that "have the effect of prohibiting the *ability* of any entity to provide" service does not naturally lend itself to a strict concept of "prevent" or "preclude."[25] Moreover, the statutory purpose of eliminating barriers to entry would be thwarted if preemption was not available for local actions that materially inhibit the efficient functioning of competitive markets. Congress should fix this problem by codifying the FCC's interpretation of Section 253(a) and preempting local actions that materially inhibit a carrier's ability to compete in a fair and balanced legal and regulatory environment.

3. <u>Direct NTIA and the FCC to Identify Spectrum Suitable for Broadband.</u>

There is no doubt that consumers' reliance on wireless devices for broadband services, and thus their need for more bandwidth, will continue to grow. Wireless providers need suitable and sufficient radio spectrum in order to meet this need. The Government has the responsibility to identify and license that spectrum in the public interest. As Chairman Boucher recognized in his opening statement, one way to accomplish this is to "direct NTIA to undertake a survey of possible new spectrum that can be auctioned for this purpose." Congress's and the industry's experience with repurposing spectrum from federal to commercial use teaches that this will be a multi-year process. Reallocating the AWS spectrum, for example, consumed many years, yet portions of that band still remain uncleared of federal agency users. The sooner Congress

[25] *See Nixon v. Missouri Municipal League,* 541 U.S. 125, 132 (2004).

directs NTIA to identify candidate government spectrum bands, the sooner Congress can move toward making more spectrum available for the growing bandwidth demands of consumers and businesses.

Congress should also direct the FCC to identify which non-federal bands can be reallocated for commercial wireless services. While several bands have recently been made available for broadband services, e.g., the AWS, 700 MHz, and BRS bands, the anticipated growth of bandwidth-intensive services will require additional spectrum allocations. The FCC should take proactive steps now to ensure such spectrum is available when it is needed. It should start by conducting a spectrum inventory to determine which bands suitable for broadband can be made available for that purpose.

It is not necessary, however, for legislation to direct the FCC to conduct an exhaustive inventory of all spectrum bands it manages, as many of those bands would not be suitable for broadband, and some are already allocated and available for such services. For example, conducting a detailed inventory of spectrum bands used for commercial mobile radio services would not produce useful information that would lead to the identification of more spectrum for broadband. Some of these bands have already been widely deployed for broadband services (e.g., cellular and PCS), while others have not yet been cleared and made available for use (e.g., AWS and 700 MHz).

Limited NTIA and FCC resources should be devoted to inventorying those spectrum bands that provide the best candidates for future allocation, licensing, and deployment for broadband services. Moreover, the agencies should focus on identifying spectrum bands that can be harmonized with spectrum allocations in other parts of the world. Global harmonization of spectrum allocations can lead to significant public

benefits, including lower equipment cost, more rapid deployment, and greater interoperability of advanced wireless systems worldwide.

4. Designate the 700 MHz D Block Spectrum for Public Safety Use.

The 700 MHz auction is generally viewed as a tremendous success, raising nearly $20 billion for the U.S. Treasury and licensing new spectrum to meet growing consumer demand. But it failed to achieve one important objective: It did not address public safety's dire need for a national, interoperable, wireless broadband network.

It has been nearly eight years since the 9/11 attacks exposed the serious lack of interoperability that plagues the nation's public safety communications networks. We should not arrive at the ten-year anniversary of 9/11 without having a plan to address public safety's needs once and for all. It is time for Congress to step up and enact a bold new plan to address this national security imperative.

Licensing the D Block through another FCC auction is the wrong path. The D Block auction failed for many reasons. For one thing, its economics were fundamentally flawed. The FCC's concept was that someone would be willing to spend the money to build a network for public safety, in exchange for gaining access to public safety's adjoining spectrum. But the unavoidable problem with that concept is that the cost of building such a network far exceeds the value of the spectrum, particularly given first responders' desire for stringent performance standards. The auction also failed because the rules created far too much uncertainty for bidders. Too many essential details were left to post-auction negotiation, leaving prospective bidders without knowing what obligations they might incur.

Public safety can benefit when government and commercial interests develop effective partnerships. But a "redo" of the failed D Block auction is not the answer, because the goals of auctioning spectrum to the highest bidder, and building a state of the art public safety broadband network, are fundamentally at odds. The more the FCC tips the rules to encourage broad and vigorous participation by bidders, the less it can ensure public safety's objectives. The FCC' D Block "conditioned license" approach is not the solution, as the last auction results made clear. It is economically flawed and fraught with inevitable uncertainty and risk – both for public safety and for bidders.

Verizon Wireless has thus been advocating a plan based on a new public-private partnership approach being put forward by New York City and other large cities. This approach would ensure that control over the process remains in the hands of those that best understand public safety's needs – state and local law enforcement and first-responder agencies. It has four key, interdependent principles.

First: Congress should reallocate the D Block to Public Safety, directly. By providing public safety with both access to sufficient spectrum and direct control over its use, Congress can ensure that the D Block is used to meet public safety's expanding communications needs.

Second: Congress should direct the FCC to license the D block spectrum and the adjoining 10 MHz of public safety broadband spectrum to public safety agencies on a state and local (or regional) basis. Direct assignment of all of the spectrum to state and local public safety entities will enable them to have greater control over network design and day-to-day operation, based on local factors such as geography, population distribution, public safety capacity needs, and existing commercial networks.

Third: Congress should direct the FCC to adopt a national technical framework that will ensure nationwide interoperability. While local or regional networks may be the best way to satisfy public safety diverse needs, letting them develop independently without any guiding national principles would repeat the mistakes of the past. This problem can be avoided by using IP-based solutions and establishing national technical standards that ensure these IP networks work together as one.

Fourth: public safety should be free to select the commercial partner or partners of their choice, using an RFP process or similar competitive approach. Local or regional partnerships that are tailored specifically to meet the needs of individual public safety agencies across the country are more likely to succeed than attempting to establish a single national partnership through an auction, which would require public safety to commit to a single model that may not satisfy local public safety agencies' needs.

By establishing a national plan that follows these principles, and providing state and local governments with federal funding to implement the plan, Congress will put the country in the best position to address emergency communications needs. Public safety agencies get control over use of the spectrum, control over how the networks are built, and control over who they partner with. By partnering with the private sector, these agencies leverage the tremendous investment in networks that have already been made, eliminating significant costs for state and local government. We urge the Subcommittee to move quickly toward legislation accomplishing this approach because it best meets the urgent need to achieve interoperable public safety networks.

NEW REGULATION OF AGREEMENTS WIRELESS CARRIERS USE TO OBTAIN HANDSETS, ROAMING, AND BACKHAUL WOULD BE UNJUSTIFIED. AND WOULD HARM INNOVATION AND COMPETITION.

While Congress should enact single set of national consumer protection rules, streamline tower siting, identify new spectrum for broadband, and provide public safety more spectrum, some parties have called for new regulation of contracts wireless carriers use to build and run their business. Specifically, they want Congress or the FCC to intervene into the private agreements wireless carriers negotiate to purchase handsets for resale to their customers, to obtain roaming rights, and to secure network backhaul capacity to transmit their traffic.

The Government should always be extremely wary of intruding into contracts that are negotiated among private businesses. It is axiomatic that regulation can distort markets and create inefficiencies by affecting the behavior of competitive businesses. Regulation that intervenes into private contracts to set prices, terms or conditions is particularly harmful, because it affects the very essence of a free market – firms competing to differentiate themselves and attract customers through negotiation of contracts for the goods and services they need. Calls for regulating private business agreements should be suspect in any competitive market. They are especially misguided in the context of the hypercompetitive wireless industry, where literally hundreds of suppliers, application developers and service providers compete every day to develop and market hundreds of constantly evolving products, features and services.

1. Regulating Exclusivity Arrangements In the Competitive Device Market Would Be a Radical Government Intrusion That Would Hurt Innovation.

The Rural Cellular Association (RCA) has asked the FCC to examine exclusive handset arrangements in supply contracts between wireless service providers and equipment manufacturers and to "adopt rules that prohibit such arrangements when contrary to the public interest."[26] In testimony to the Subcommittee, Cellular South asked for legislation to restrict exclusivity agreements. The claim is that equipment vendors do not offer smaller wireless providers an adequate array of handsets, and, therefore, consumers would rather obtain equipment and service from a large provider with more handset selections.

Neither Congress nor the FCC should accede to these requests because:

- The wireless device market is fiercely competitive. No regulation is needed to enable consumers obtain the innovative devices that fit their needs.

- Exclusivity arrangements are beneficial to consumers because they drive a broad array of innovative and constantly evolving wireless devices. Restricting these arrangements would, by contrast, mean that putting resources at risk for R&D and new devices has *zero* value, because a competitor could immediately market the same device, without investing any capital or incurring any risk of its own. Just as patent and copyright laws safeguard and encourage innovation, so does device exclusivity promote investment and innovation, which in turn benefits consumers.

- There is no economic rationale for regulating handset procurement agreements. Doing so would be a radical and unwarranted intervention by the Government into private contracts.

- Regulating "exclusivity" would be unworkable given the innumerable variations in how devices are developed, customized, and marketed. The requested ban will not put any specific device into the product line-up of any particular provider.

[26] Rural Cellular Association, Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM-11497, filed May 20, 2008.

The Wireless Device Market is Highly Competitive.

The U.S. handset market is characterized by significant competition among about three dozen well-established and newer, independent manufacturers, including Motorola, Nokia, LG, Samsung, Research in Motion, Palm, HTC, and ZTE. From these manufacturers, hundreds of wireless phones and devices are available to U.S. consumers. CTIA recently noted that consumers have access to 630 different wireless handsets and devices, compared to, for example, less than 150 in the U.K.[27]

Equipment manufacturers offer their products to consumers through many channels, including big box stores, wireless providers, and the manufacturers' own websites. In short, consumers have choices, and they make selections based on what features they find attractive. Exclusive handset arrangements that manufacturers might have with service providers are not preventing them from selling equipment to *multiple* service providers, and such arrangements are not preventing service providers from offering communications services featuring *multiple* manufacturers' handsets. No single manufacturer or service provider has sufficient market power in its respective market to control the wholesale or retail distribution chain or prevent a handset manufacturer from working with its wireless carrier competitors. The relevant question is not whether two or more wireless providers can distribute the same device such as the LG Voyager, but whether wireless providers can work with equipment manufacturers to develop a device competitor to the LG Voyager. That answer is clearly "yes."

RCA and Cellular South assert that the market share of larger providers is a barrier to distribution of desirable handsets by smaller carriers, but offer no supporting

[27] CTIA May 12 Letter at 2 and accompanying charts.

facts. While manufacturers want to sell as many units as possible and to get a firm commitment from large providers to buy as many units as possible, there is nothing to stop smaller providers from banding together, and so representing potentially millions of subscribers, to get products. That is exactly what Bell Atlantic NYNEX Mobile, AirTouch Cellular and US West New Vector did when they were regional carriers to secure new handsets. Some rural providers have taken similar steps to jointly purchase devices, and can expand those efforts to form larger buying consortia.

Exclusivity Arrangements Benefit Consumers and Drive Innovation by Protecting Intellectual Capital and Promoting Risktaking.

Desirable new devices generally arise from exclusive arrangements because having the latest and greatest device is a primary driver for competitive differentiation in the wireless marketplace. Verizon Wireless and its suppliers spend substantial resources to develop new devices. Exclusivity arrangements – like copyrights and patents – encourage handset developers and carriers to take risks that lead to innovation, by protecting innovation and intellectual capital and discouraging "free riding."

Offering "exclusive" handsets is a critical way to implement new devices and features, and serves as a point of competitive differentiation among wireless providers. Exclusive arrangements, including time-to-market based arrangements, also promote innovation and consumer choice. Competition for "exclusive" handsets has repeatedly produced innovations in technology and features that benefit consumers and ultimately all wireless service providers. However, wireless providers would have less incentive to develop and promote a handset that every other provider will have immediate access to without having to make a comparable investment in research and design. Requiring every handset to be available to competing providers, who can "free ride" and pick and

choose among the handsets that have been successful, will only deter investment in the innovation that has benefited consumers.

The substantial cost to design the increasingly sophisticated devices consumers want – many of which function as handheld computers – will be borne by the service provider or by the consumer. Exclusive arrangements have the economic benefits of encouraging branding and promotional efforts by the provider, which generally will include offering the "exclusive" handset at a subsidized price to help it ensure a revenue stream from the handset and to help shift the costs of the new device away from the consumer to make it more affordable. Conversely, allowing competitors to market the same devices – without incurring any of the extensive research and development investment that these devices require – would clearly undercut the economics of (and deter investment in) innovative new products.

RCA and Cellular South would like to perpetuate an inaccurate view of the development of wireless devices: that manufacturers create an array of handsets, and then the large carriers go in and tell them which ones to put into a lockbox. In fact, devices do not result merely from manufacturers' innovation. Rather, they result from collaboration between manufacturers and carriers. Most devices that Verizon Wireless offers are products of enormous investment of time, money and personnel by both companies. For example, Verizon Wireless starts developing a line of handsets months ahead of the time those handsets would be marketed. We work very closely with manufacturers to develop the technical and "look-and-feel" requirements for each handset. Beyond the basic operating system and service chips – which are available to all manufacturers and providers – these requirements may include programs to access certain

features that we offer, such as location-based services or music services. They may also include features that we determine are important to customers, for example, the width of the handset, the sensation from a touch screen, the configuration of a QWERTY keyboard, and colors. Once all these requirements have been determined, they are provided as a package of specifications to the manufacturers who produce the finished products. The resulting devices can reflect various combinations of generic, exclusive and proprietary elements, depending upon the handset and manufacturer.

For another carrier to market the "same" device, it would have to intervene in this development process – which obviously raises concerns about access another carrier's confidential and proprietary market research and development process. Government intervention into this process by regulating device contracts would dampen if not kill individual carrier research into creativity and consumer preferences because suppliers and providers would not be able to protect their proprietary work.

There is No Economic Support for Intervening in Private Agreements.

Neither RCA, in its petition to the FCC, nor Cellular South in its testimony to the Subcommittee, offered any economic analysis or evidence supporting their demand that the Government regulate the terms of agreements between handset manufacturers and carriers. Their assertions of lack of consumer choice ring hollow given the conflicting evidence amassed by the FCC in its yearly competition reports and other data placed in the record of the RCA proceeding.[28] Their efforts are more about seeking a Government "thumb on the scale" to assist them, than it is about serving wireless consumers.

[28] RCA's Petition and comments on the petition are available on the FCC's Electronic Comment Filing System under Docket No. RM-11497.

In fact, there is extensive economic evidence that exclusivity agreements are pro-competitive and drive innovation. For example, economist Michael Katz recently submitted a detailed declaration to the FCC in opposition to RCA's petition. He concluded, "It is widely accepted in legal, public policy, and economic analysis that exclusive contracts frequently promote competition and consumer welfare," and that "The evidence indicates that use of exclusive contracts between wireless carriers and handset manufacturers promotes competition and benefits consumers."[29]

The economic value of exclusivity arrangements is apparent because they are common among many industries, including the consumer electronics industry. Consumers are familiar with products being associated with certain retailers (MACs with Apple), or some products only working in conjunction with certain other products (certain games with Xbox or Sony's Playstation). Toyota automobiles are not available at Ford dealerships, and Dell PCs are not available at Apple's stores. Many retailers develop "house" brands that are uniquely available at their stores. Handsets are built with many functions and features that provide multiple opportunities for differentiation. As in other industries, each provider must determine what combination of features and functions will attract customers. For the Government to intrude into private contracts by regulating exclusivity terms would undermine the very innovation and differentiation that the Government should want to promote.

[29] Michael Katz, "An Economic Analysis of the Rural Cellular Association's Petition for Rulemaking Regarding Exclusivity Arrangements," attached to Comments of AT&T on RCA Petition, RM-11497, filed February 20, 2009.

Regulating Exclusive Arrangements Would Be Totally Unworkable.

There would also be enormous and intractable obstacles to regulating exclusivity agreements. First, U.S. wireless devices are broadly divided between CDMA, GSM and iDEN, technologies that are not interoperable. AT&T operates a GSM network, and the iPhone is only marketed in the United States as a GSM device. Would regulation require Apple to build a CDMA version? Sprint Nextel offers Motorola push-to-talk devices using iDEN technology, which is generally not available through other providers. Would Motorola be required to build a GSM version of an iDEN device? In both cases, these devices are "exclusive" in that customers of carriers using different technologies cannot buy them. There are other intervening barriers based on provider technology choices and equipment vendor business choices. Historically, some handsets have always been "exclusive" in that the vendor for business reasons excludes certain carriers, for example, by technology choice (Motorola's iDEN devices) or by business planning (Nokia's focus on GSM technology). Regulating exclusivity would improperly intervene in the device sector's technology choices.

Second, there are many forms of exclusivity agreements, ranging from the exclusive marketing arrangement to exclusive deals for specific handset colors. Simply identifying what agreements to regulate would be problematic. If Samsung designs a device with a user interface developed by Verizon Wireless, does that device have to be made available to any competitor? What about other shapes and features? What about agreements to sell a device only in certain retail outlets or markets? What about the device's name and branding? Most devices are "exclusive" in that they are customized

for particular carriers, who then use the devices to differentiate their offerings. When and how would the Government force suppliers to offer these devices to other providers?

Third, the nature of wireless networks makes close collaboration between network providers and device manufacturers essential, and may lead to exclusive agreements or *de facto* exclusive devices. Wireless devices are *part* of the wireless network. Devices like the Blackberry and iPhone depend upon tight integration between the hardware, software, and network to enable a high-quality and successful user experience, and an exclusive handset developed by collaboration between the service provider and equipment vendor ensures that successful handset. Verizon Wireless works with manufacturers to design the many different technical and "look-and-feel" requirements for each handset, ranging from available applications like location-based services and music services, to "form factors" such as the style of keyboard. It would make no sense to obligate the manufacturer to sell that device to other carriers.

Fourth, the unique user experience on wireless devices developed by specific providers, essential to competition-driving differentiation, would be negated by a mandate that manufacturers offer the devices to other providers. Most Verizon Wireless handsets provide the user with the same user experience, such as how calls are made and what features are available. Subscribers can move from a Motorola, to a Samsung, to an LG handset without noticing who made the handset yet experience the same look and feel and features. Exclusive arrangements help ensure that the manufacturer will build a handset with a consistent user experience, resulting in easier procedures for customer switching and facilitating the provision of customer service and repair. Forcing providers

to offer "the same" handset for every device model would undermine the creativity and differentiation that goes into the internal software and feature specifications.

It would be impossible to force providers to offer "the same" handset for every device model without eliminating the creativity and differentiation that goes into the internal software and feature specifications. If a manufacturer stripped out the specific proprietary elements, so that it could be sold by other providers, the handset may be an LG Voyager, but it would not be the same LG Voyager offered by Verizon Wireless. The idea that any provider can sell the same iconic handset is true only to a certain extent – the handset each provider sells will ultimately be tied to the quality, features, and functionality of what the provider has put into the network based on its own views of what the market demands. Ultimately, the process requires the wireless provider to go to market with a device that may or may not be successful. The provider has to absorb that risk. But RCA or Cellular South notably do not complain about not getting the devices that did not succeed.

Verizon Wireless Agreed to Limit Exclusivity at the Request of Small Providers.

Cellular South testified before the Subcommittee that the largest wireless companies lock up popular handsets with exclusivity agreements. It did not advise the Subcommittee that in fact, more than two months ago, and at CellSouth's request, Verizon Wireless voluntarily agreed to eliminate long-term exclusive agreements with two major handset makers for CellSouth and 24 other small providers. Cellular South informed these companies, which comprise a the Associated Carrier Group (ACG) consortium, "In a spirit of cooperation with ACG, Verizon Wireless has agreed to limit any exclusivity arrangements covering Verizon Wireless handsets that are produced by

equipment vendors LG and Samsung to no longer than six months following launch of the handset." It also referenced this agreement in a letter to the FCC.[30] Verizon Wireless has advised RCA that it is willing to extend this agreement to other smaller providers.

From its testimony it now appears that what Cellular South seeks is not simply a limit on contractual exclusivity terms, which by definition restrict the marketing of a device for some period of time after it launches in the market, but a Government-granted right to barge into the device development process before devices are launched. It asserts that it "needs" to gain access to devices in development in order to have competing devices. This request is breathtaking in its implications as well as totally unjustified. Cellular South would overturn the fundamental rationale of trade secrets – the right of manufacturers and carriers to work on new products without fear of competitors gaining access to their obviously proprietary work. Never to our understanding has the Government compelled companies to allow competitors to access products that have not yet even been launched. That Cellular South would make such a request exposes the illegitimacy of its call for Government intervention into the handset device market.

2. New Roaming Regulation Is Unwarranted and Would Deter Investment in New Infrastructure and Technology.

The FCC relies on limited regulation of intercarrier roaming, which recognizes the benefits of leaving carriers largely free to work out mutually advantageous agreements, as carriers do with other contracts they use to run their businesses. It allows carriers to negotiate roaming contracts subject to the obligation to deal in good faith and

[30] Letter from David Nace, Counsel for Cellular South, to Secretary, FCC, RM-11497, April 23, 2009.

not seek unreasonable or discriminatory terms and conditions. The Commission emphasizes that it will vigorously enforce those bedrock requirements.[31]

The current system of market-based automatic roaming agreements has spurred innovative new services and lower prices.

The FCC's roaming policy has paid off in three ways: Service providers are investing in new technologies, roaming charges have steadily declined, and carriers are building out in rural areas in order to minimize the high "tollgate" roaming charges formerly imposed by rural carriers.

Providers are investing to expand their footprints and upgrade their networks from analog to 2G and 3G digital technologies and soon to 4G networks. Competitive roaming policies promote this trend by incenting carriers to develop networks capable of providing advanced services to customers. Carriers with advanced services are willing to give favorable roaming terms to other carriers that have implemented similar advanced technology in their networks so that when customers roam they can use these same advanced services. The marketplace thus drives carriers to modernize their networks. Customers that buy a new product or service in their home market want to have those capabilities when they travel. Accordingly, carriers offering the new product or service have the incentive to negotiate when to make the innovations available to their roaming partners at competitive rates.

Roaming prices have also declined. Customers increasingly demand the ability to travel outside of their home markets and use their wireless services as they travel. In response, service providers have developed regional and national calling plans that allow

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[31] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817 (2007) ("CMRS Roaming Order").

customers to roam onto other networks. Competitive pressures have also forced providers big and small to lower costs in an effort to offer lower prices to their customers. One of the most significant costs carriers face is the cost of roaming. Thus, the healthy competition in the CMRS marketplace has exerted a downward pressure on CMRS roaming rates. Indeed, the Commission recently found that "the contribution of roaming revenues to total service revenues continued its decline . . . to 2.7 percent in 2007, down from over ten percent seven years ago."[32] Verizon Wireless' experience is that the average roaming rates today are less than ten percent of what they were ten years ago.

The Commission's policy to allow competitive forces to work in the roaming services market has also caused carriers to build out in rural areas. For years, some cellular carriers serving rural markets extracted high roaming rates from carriers looking to offer their customers an expanded service area through roaming. Rather than seeking regulatory intervention by the FCC to lower these "tollgate" rates, carriers chose to work within the market structure to address the problem. Carriers have elected to eliminate the most egregious roaming costs by expanding into rural markets through acquiring new licenses or building out their footprint. Due to these efforts, competition has expanded into rural markets more rapidly and roaming rates have steadily declined.[33] Indeed, the Commission recently found that "[t]here is no evidence in the record to indicate that wireless carriers in rural areas have the ability to raise prices above competitive levels or to alter other terms and conditions of service to the detriment of rural consumers."[34]

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[32] Thirteenth CMRS Competition Report, at 76-77.

[33] *Id.*, at 6.

[34] *Id.*, at 58-59.

Despite the tangible benefits that have resulted from the Commission's pro-competitive roaming policies, some providers continue to urge the Congress and the FCC to adopt more regulation. In particular, these providers have asked the Commission to require carriers to offer in-market roaming and roaming for non-interconnected services such as wireless Internet access services.[35] As discussed below, such regulation would hinder carriers' ability to differentiate themselves on the basis of superior coverage in home markets, remove incentives to build out networks more rapidly and to invest in advanced technologies, and would conflict with the Administration's goal of incenting carriers to invest in building broadband networks, particularly in rural areas.

Mandating In-Market Roaming Would Deter Investment and Distort Competition.

In-market or "home" roaming refers to a carrier's ability to obtain automatic roaming agreements from competitors in markets where the requesting carrier owns spectrum rights and therefore competes or plans to compete head-to-head for customers in the market. In fact, when a requesting carrier seeks to use a competitor's spectrum rather than build out coverage in its own home market, that requesting carrier wants to enjoy the fruits of a competitor's investment in a market where it could itself deploy service. Government should not encourage, let alone mandate, home roaming where a carrier has unencumbered access to spectrum that it can use to deploy its own network.

[35] In an effort to get expanded in-market and non-interconnected services roaming rights, some carriers have asked the FCC to expand the roaming conditions adopted by the FCC in approving the Verizon Wireless/Alltel merger through petitions for reconsideration and/or "clarification." Some have even suggested that Verizon Wireless is failing to honor those roaming conditions. Verizon Wireless recently responded to those petitions and allegations in an extensive filing. Letter from Helgi Walker, Counsel to Verizon Wireless, to Secretary, FCC, Docket No. WT 08-95, May 8, 2009. In brief, these parties want to leverage the merger process to impose home roaming requirements on Verizon Wireless alone. But the proper place for considering roaming rules is through a rulemaking. To the extent these parties believe Verizon Wireless has violated a merger condition, they can bring a complaint, which they have not done.

Demands for a home roaming requirement cannot be squared with the FCC's findings less than two years ago, in the *2007 Roaming Order*. Based on an extensive record, the Commission found that an automatic in-market roaming obligation would "not serve our public interest goals of encouraging facilities-based service and supporting consumer expectations of seamless coverage when traveling outside the home area." Rather, such an obligation would allow a carrier "to 'piggy-back' on the network coverage of a competing carrier in the same market." Under such a regime, "both carriers [would] lose the incentive to build-out into high cost areas in order to achieve superior network coverage." Thus, the Commission found that an in-market roaming obligation would *disincent* wireless carriers from investing in new infrastructure and ultimately harm consumers:

> If there is no competitive advantage associated with building out its network and expanding coverage into certain high cost areas, a carrier will not likely do so. Consequently, consumers may be disadvantaged by a lack of product differentiation, lower network quality, reliability and coverage. In other words, we believe that requiring home roaming could harm facilities-based competition and negatively affect build-out in these markets, thus, adversely impacting network quality, reliability and coverage. [36]

The rationale for the in-market exception is self-evident – a carrier that can piggyback off its competitor, and tout the competitor's network as its own, has less incentive to invest in its own network there. As the FCC recognized in the *2007 Roaming Order,* the in-market roaming exception fosters competition among rivals firms in the home market and provides incentives to invest in building out the home market. To illustrate, some carriers elect only to construct enough facilities in a market to serve the population centers and major highways to keep costs low. They can thus offer lower

[36] CMRS Roaming Order at 15835, ¶ 49.

rates than carriers that invest the money to build facilities to less populated parts of the market. In these markets, the higher cost provider's main competitive advantage over its lower cost rivals is its superior network coverage and quality. Customers in such markets can choose to pay less for service, or to pay more and receive better coverage and quality. At the same time, the lower cost provider has the choice to invest more in its network to improve coverage and quality. If the Commission were to adopt mandatory home roaming, firms would lose the ability to compete on the basis on network coverage and quality, and low-cost providers would have less incentive to invest in their networks beyond what is required by the Commission.

A mandatory home roaming obligation would also undermine a key objective of the American Recovery and Reinvestment Act of 2009 ("ARRA"),[37] to promote construction of new wireless broadband infrastructure and job creation. In the conference report accompanying the ARRA, the conference committee emphasized that ARRA broadband grants should be distributed in a way to "ensure, to the extent practicable, that grant funds be used to assist *infrastructure investments*."[38] The conferees also emphasized that "the construction of broadband facilities capable of delivering next-generation broadband speeds is likely to result in greater job creation and job preservation . . . ."[39]

A home roaming obligation which would allow providers to avoid building out networks in licensed areas directly contravenes the President's and Congress's goals of stimulating infrastructure investments and broadband deployment. Where a carrier seeks

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[37] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

[38] H.R. REP. No. 111-16, at 774 (emphasis added).

[39] *Id.* at 775.

to piggy-back on another provider's network in areas where the requesting carrier already holds spectrum, requiring carriers to grant in-market roaming would deprive the local economies in those areas of much-needed jobs and capital. Under the current roaming rules, if a carrier wants to expand coverage in a market where it holds spectrum, it likely would need to deploy its own infrastructure. This would require an influx of capital and generate jobs in that market for workers to engineer and construct the system and to oversee its operations.

Mandated Access to Advanced Data Services Would Also Undercut Innovation.

Some parties want the FCC's current automatic roaming rule to be expanded in another way, to require carriers to provide all data features and technologies they offer to their own customers to roaming customers of other carriers. But such a sweeping data roaming obligation would discourage carriers from deploying advanced services. It creates the risk that competitors will piggyback on that investment through demanding roaming agreements that give them access to those advanced services, rather than investing in those services on their own.

The Commission found in its *2007 Roaming Order and FNPRM* that "allowing competitors in a marketplace to gain competitive advantages from their own innovations results in value to subscribers – in terms of new service offerings and features."[40] In the highly competitive CMRS market, carriers are constantly investing in new advanced services that will enable them to provide additional value to customers. Decisions to invest in new services involve a significant amount of risk and require large investments in network upgrades. Carriers will be more willing to make these investments where the

[40] CMRS Roaming Order, 22 FCC Rcd at 15845 (¶ 78).

investments will differentiate them from their competitors and therefore be more likely to earn a positive return. Conversely, carriers will be less willing to take the risks associated with investing in innovative technologies if a roaming rule mandates carriers to offer the benefits of that innovation to competing carriers. The Subcommittee should thus not consider legislation to require advanced data services roaming.

Some parties have argued that including advanced wireless services as part of the automatic roaming requirement is the only way to ensure ubiquitous access to mobile services. However, history has shown that the competitive marketplace can and will ensure that roaming agreements for such services will be negotiated in response to market conditions. When a carrier decides to invest in advanced services or new capabilities, there is a considerable incentive to preserve the benefit of the new service or capability for the carrier's own customers in order to provide additional value that will help to retain existing customers, attract new customers, and competitively differentiate its service. As a carrier's customers use the new services made possible by the investment, however, those customers begin to expect those services to be available as they travel outside of their home markets. Carriers thus are incented to negotiate roaming agreements with other carriers to enable customers to use the services and features when they travel. Carriers will inevitably reach a cross-over point where the benefits of enabling ubiquitous access to advanced services and features outweighs the benefits of preserving access to those services for their own customers. Once that cross-over point is reached, carriers will negotiate to include these services in their roaming agreements.

The evolution of CDMA data roaming illustrates how these market incentives work. Before Verizon Wireless deployed CDMA EvDO technology, CDMA 1xRTT data

was its premier data technology. When Verizon Wireless first implemented 1xRTT on its network, it did not offer 1xRTT data to its roaming partners so that it could differentiate itself from competitors. However, as other CDMA providers implemented 1xRTT and Verizon Wireless' customers began to want the services and features that depend upon 1xRTT data as they traveled, roaming arrangements were formed. As a result, today 1xRTT data roaming is commonplace. Similarly Verizon Wireless used its multi-billion dollar investment in EvDO as a competitive differentiator when it was first launched. As other CDMA carriers invest in their own EvDO networks, roaming agreements for CDMA EvDO are becoming more commonplace. Verizon Wireless already has EvDO data roaming agreements in place in some markets, including agreements with small and rural wireless carriers.

Because the competitive marketplace already incents carriers to enter into roaming agreements for data services, policymakers should allow market forces to work and should not disrupt market forces through regulatory intervention. The FCC already has a proceeding underway to consider whether to expand the existing roaming rules to reach advanced data services. The Subcommittee should allow the Commission to continue its inquiry into this issue, rather than consider legislation. The FCC could, for example, apply its data roaming requirement to services that the requesting carrier has deployed to some threshold percentage of its coverage area or its customers. This would reduce the risks discussed above of one carrier piggybacking off of a competitor's innovation and investment. It would also encourage carriers to upgrade their own networks to provide data services, because that action would enable them to secure expanded roaming rights.

3. Vigorous and Growing Competition for Wireless Backhaul Undercuts Any Basis for Reregulating Wireline Backhaul Prices.

In Verizon's and Verizon Wireless's respective capacities as a provider and a purchaser of backhaul services,[41] we see numerous alternatives for backhaul services. As a provider of wireless backhaul and other high-capacity services, Verizon typically competes against a number of different types of providers, including cable companies, fixed wireless providers and traditional fiber-based providers. As a purchaser of wireless backhaul services, Verizon Wireless receives bids from a number of different types of providers when it solicits bids for backhaul services. The result of this extensive competition has been that widespread, low-cost backhaul services are available in the United States. Indeed, the Industry Standard has reported that the Chief Technology Officer for Sprint Nextel indicated that T-1 lines, the most common type of high-capacity connection to cell sites, are "[r]elatively abundant and inexpensive" in the United States.[42] Likewise, Clearwire says it can provide 80%[43] of its own backhaul and that it will also provide backhaul to Sprint Nextel at "preferred rates."[44]

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[41] Wireless backhaul services are simply a type of dedicated high-capacity services that are used to transport voice and data traffic from cell sites and towers to wireless providers' mobile switching centers for switching to the Internet backbone or wireline telecommunications network. More broadly, "high-capacity services" include dedicated large capacity telecommunications transport sold to other carriers and large businesses. "Special Access" is a regulatory term used for some high-capacity services provided by regulated carriers including Verizon.

[42] S. Lawson, *Sprint Picks Wireless Backhaul for WiMAX,* Industry Standard, http://www.thestandard.com/news/2008/07/09/sprint-picks-wireless-backhaul-wimax (July 9, 2008)(citing Sprint CTO Barry West).

[43] *See* John Hodulik, UBS Investment Research, *Clearwire Corp.* at 13 (Dec. 19, 2008).

[44] Sprint Nextel /Clearwire WiMax Call-Final, Fair Disclosure Wire, Transcript 050708a1844939.739 (May 7, 2008) (statement by Ben Wolff, Chief Executive officer, Clearwire)..

The extensive competition for wireless backhaul services is particularly vigorous in urban areas where demand for high-capacity services from cell sites and commercial businesses is most concentrated. The concentration of demand in these areas makes it worthwhile for a variety of competitors to construct facilities that offer competing backhaul services. For example, as a result of this concentration, traditional fiber providers such as Level 3 Communications and Global Crossing have built networks in these areas and offer competing services. In addition, as addressed further below, cable companies have ubiquitous networks in these areas and are aggressively marketing competing backhaul services. Finally, fixed wireless providers such as FiberTower and NextLink (a division of XO Communications) offer new backhaul service alternatives that are provided using microwave facilities.

In some more remote locations, there may be instances where no provider historically had deployed higher-capacity facilities because the traffic volumes were not sufficiently large to warrant doing so. In those circumstances, in order to deliver the higher capacity required by newer generation wireless broadband networks, any backhaul provider will have to deploy fiber, microwave and other non-copper facilities in the first instance that are needed to deliver those higher capacities. And there are a number of providers contending to do so in these circumstances as well, including cable companies and fixed wireless providers as well as traditional telephone providers.

Indeed, as Verizon Wireless and other wireless providers have upgraded to third generation (3G) and soon to fourth generation networks (4G), wireless traffic volumes have increased exponentially, boosting demand for backhaul services and making it necessary to upgrade to higher-capacity facilities in all areas. Independent analysts at

Raymond James have estimated that the size of wireless backhaul marketplace in the United States could grow from approximately $3 billion annually to approximately $8 to $10 billion in the next three to five years, driven in large part by increase in the amount of wireless data traffic.[45] This exponential growth in demand and need for upgraded high-capacity facilities has led many providers, including several new entrants, to focus on providing backhaul services. Where higher-capacity facilities must be constructed in the first instance, no backhaul provider has any inherent advantage. Thus, although Verizon is constructing new connections to meet the growing demand for high-capacity backhaul services, it is also competing with a variety of alternative providers.

In recent years, cable companies have been particularly aggressive in providing backhaul services. Given their ubiquitous networks, cable companies can readily serve cell sites. In 2008, the Chief Operating Officer of Comcast told Wall Street that backhaul services are a "huge opportunity" using the facilities that Comcast "already [has] out there" and that Comcast will be able to provide backhaul "cheap[er] than the typical alternative."[46] Similarly, the Chief Operating Officer for Time Warner Cable has described backhaul services as the next "great opportunity" for Time Warner Cable and has also indicated that because Time Warner Cable's fiber is close to cellular towers, it will not require "much incremental expense" for Time Warner Cable to provide backhaul services to those towers.[47]

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[45] F. Louthan, IV et al., Raymond James & Associates, Inc., *Examining the Convergence of the Telecom and Cable Sectors,* at 16 (Aug. 18, 2008).

[46] *Comcast Corporation at Merrill Lynch Media Fall Preview-Final*, Fair Disclosure Wire, Transcript 090908a1928849.749 (Sept. 9, 2008) (statement by Steve Burke, President and Chief Operating Officer, Comcast).

[47] *Time Warner Cable, Inc. at Merrill Lynch Media Fall Preview-Final,* Fair Disclosure Wire, Transcript 090908au.781 (Sept. 9, 2008) (statement by Landel Hobbs, Chief Operating Officer, Time Warner Cable).

Fixed wireless providers, including FiberTower and NextLink are also rapidly expanding to new areas. Like cable companies, fixed wireless providers have boasted about their ability to serve cell sites rapidly at relatively low cost compared to other providers. In testimony to this subcommittee, FiberTower stated that it "leads the nation in providing backhaul services," and already "provides backhaul service to over 6,000 mobile base stations (or cell sites) in 13 [major] markets."[48] FiberTower's written testimony also states that FiberTower has "customer agreements with eight of the largest U.S. wireless carriers." *Id.* Similarly, NextLink has an extensive network, "with fixed wireless licenses covering 95% of the top U.S. business markets"[49] and targets as primary customers "mobile wireless and wireline telecommunications carriers, large commercial enterprises and government agencies."[50]

Competing wireless providers and cable companies have also entered into various arrangements with new entrants in the marketplace. For example, Clearwire, with investment from Sprint Nextel, Google and certain cable companies, has deployed extensive fixed wireless facilities nationwide. Clearwire claims to have "one of the largest wireless backhaul networks in the world"[51] and has told analysts that it is investing in microwave equipment so it can self-provision facilities to meet "roughly 80

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[48] Written Testimony of Ravi Potharlanka, Chief Operating Officer, FiberTower Corporation: House Energy and Commerce Committee's Subcommittee on Communications, Technology and the Internet; Hearing: Competition in the Wireless Industry, at 3 and 4 (May 7, 2009).

[49] XO Communications Network Overview, http://www.xo.com/about/network/Pages/overview.aspx.

[50] XO Holdings Inc., Form 10-Q, http://www.xo.com/SiteCollectionDocuments/about-xo/investor-relations/Annual_Reports/XOH_1Q_2009_10Q.pdf at 11 (March 31, 2009).

[51] *Leap Wireless International at Jefferies Panel Discussion*, Fair Disclosure Wire, Transcript 090908ay.703 (Sept. 9, 2008)(statement by Scott Richardson, Chief Strategy Officer, Clearwire).

percent of its [wireless] backhaul . . . from microwave links," and expects this investment "will pay for itself in 10 months."[52] Clearwire has described its operating costs as "negligible"[53] and has publicly stated that Sprint Nextel is providing infrastructure to Clearwire, and that Clearwire in turn "w[ould] make its metro wireless backhaul networks available to Sprint at preferred rates, creating additional real revenue opportunities for Clearwire and reducing costs for Sprint."[54]

While facing all of this competition for its high-capacity services used to provide backhaul, Verizon and other regulated carriers remain subject to price regulation for their high-capacity services. In fact, the vast majority of high-capacity connections that Verizon and other regulated carriers provide to cell sites and commercial buildings are still subject to FCC mandated price-caps, constraining rates. In the case of Verizon, nearly 89% of the basic connections that Verizon has deployed to cell-sites and other end user locations are subject to prices capped by the FCC, including in major urban areas such as New York, Washington, D.C., Philadelphia, Boston, Baltimore, Tampa and Los Angeles.

Extensive competition has also led to significant price declines in backhaul and other high-capacity services. Indeed, the real prices customers pay to Verizon for these services have declined by approximately 24% between 2002 and 2008. These significant price declines reflect the steep discounts Verizon offers carrier customers to compete.

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[52] John Hodulik, UBS Investment Research, *Clearwire Corp.* at 13 (Dec. 19, 2008).

[53] Q4 2008 Clearwire Corporation Earnings Conference Call-final, Fair Disclosure Wire, Transcript 030509a2078472.772 (Mar. 5, 2009)(statement of Perry Satterlee, Chief Operating Officer, Clearwire).

[54] Sprint Nextel Clearwire WiMax Call-Final, Fair Disclosure Wire, Transcript 050708a1844939.739 (May 7, 2008) (statement by Ben Wolff, Chief Executive officer, Clearwire).

Independent reports confirm similar price declines industry-wide. For example, in 2006, the Government Accountability Office ("GAO") released a report which found that average revenue for traditional wireline facilities connected to cell sites and commercial buildings declined by 5 to 17 percent between 2001 and 2005.[55] More recently, the National Association of Regulatory Utility Commissioners ("NARUC") commissioned a report which observed similar substantial declines in the prices carrier customers paid for high-capacity services between 2006 and 2007.[56]

Claims that wireless backhaul and other high-capacity services are overpriced based on purported rates of return for those services have widely been discredited. These claims are not derived from actual company financial reports. Rather, they are derived from regulatory cost allocations that were never created or intended for calculating a company's earnings, let alone a company's earnings for specific services. Long ago, the FCC rejected using this type of regulatory data for ratemaking purposes.[57] More recently, the NARUC sponsored study described earnings calculations from this regulatory data as "virtually meaningless." *NRRI Report* at 70.

Claims that regulated carriers dominate more than 90% of the marketplace for wireless backhaul and other high-capacity services are likewise misplaced. These claims are based on special access revenue data that carriers report to the FCC for purposes of determining the amounts that each carrier must contribute to the FCC's various subsidy

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[55] *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, Report to the Chairman, Committee on Government Reform, House Representatives, GAO-07-80, App. II. At Table 7 (Nov. 2006) ("*GAO Report*").

[56] Peter Bluhm, Robert Loube, National Regulatory Research Institute, *Competitive Issues in Special Access Markets*, at 59 (Jan. 21, 2009) ("*NRRI Report*").

[57] *Policy and Rules Concerning Rates for Dominant Carriers,* Order on Reconsideration, 6 FCC Rcd 2637, ¶ 199 (1991) (noting that financial and operational data reported to the FCC through the Automated Reporting Management Information System "do[] not serve a ratemaking purpose.")

programs. However, this data is not intended to calculate market shares and in fact overlooks significant segments of the marketplace, including self-provisioning and high-capacity services for which competitive providers may not fully report revenue because they do not characterize those services as "special access," which is a term often used for regulated carriers' high-capacity services. For example, Clearwire says it can self-provision 80% of its own backhaul and none of this would show up in its reports to the FCC.

Finally, claims that term and/or volume discount plans for high-capacity services lock up the marketplace are wrong. Verizon offers a wide variety of pricing plans that are entirely voluntary and provide discounts of up to 65% off of Verizon's month-to-month rates. Some discounts are based on the length of time a circuit is in place (term plans) and others are based on volume commitments. With term plans, a customer can obtain a substantial discount on even a single circuit. Customers can select the plan whose requirements and discount levels best meet their needs.

Moreover, even customers who choose to participate in a term plan may leave that plan early. Generally, where a customer exits a term plan early, the customer retains a significant portion of the discounts it received for participating in the plan. For example, in the event that a customer exits an optional pricing plan at the end of the second year of a five-year term, the customer would receive the discounts they would have received if they had originally signed up for a two-year term plan. This effectively prorates the termination liability.

In short, the facts on wireless backhaul competition – extensive and growing supplier competition, declining prices, and existing regulatory price constraints –

demonstrate that this is a functioning marketplace and there is no basis for imposing additional price regulation on wireless backhaul services or other high-capacity services.

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Again, we thank the Subcommittee for the opportunity to submit our views on how the Subcommittee and Congress can best guide the development of the Government's policies to promote wireless competition and innovation. We would be happy to supply to the Subcommittee any of the materials that are referenced in this statement.

Certificate of Service

I hereby certify that on this 15th day of June copies of the foregoing "Comments of Verizon Wireless" in WT Docket 09-66 were sent by electronic mail to the following parties:

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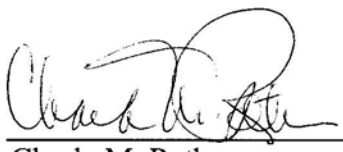

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